88-1108

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

IN RE: ROYAL COMPOSING ROOM, INC.,

Debtor.

NEW YORK TYPOGRAPHICAL UNION NO. 6

Petitioner,

against

ROYAL COMPOSING ROOM, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRWIN BLUESTEIN
(Counsel of Record)
Attorney for Petitioner
1501 Broadway, Suite 800
New York, New York 10036
(212) 354-8330

Of Counsel:
VLADECK, WALDMAN, ELIAS
& ENGELHARD, P.C.
DANIEL ENGELSTEIN
STUART E. BAUCHNER

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QUESTIONS PRESENTED

1. When evaluating the "necessity" of the modifications to a collective bargaining agreement required under 11 U.S.C. §1113(b) and (c) as a prerequisite to a debtor's application to reject that agreement, should a court define "necessity" as requiring only "essential" modifications needed to achieve the short-term goal of preventing the debtor's liquidation, see Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America, 791 F.2d 1074 (3d Cir. 1986), or should it define "necessity" as requiring "necessary, but not absolutely minimal, changes" needed to achieve the longer-term goal of a successful reorganization, see Truck Drivers Local 807 v. Carey Transportation, Inc., 816 F.2d 82 (2d Cir. 1987).

2. (a) When evaluating the "necessity" of a debtor's proposed modifications pursuant to 11 U.S.C. §1113(b) and (c), should the same standard of necessity apply regardless of the union's conduct during negotiations concerning the proposal.

(b) Assuming the same standard does not apply, should a court preclude a union that it found failed to articulate in sufficient detail its objections to a debtor's proposal from challenging the necessity of any particular modification contained in that proposal, thereby relieving the debtor of its statutory burden of establishing such necessity.

3. Assuming that the same standard of "necessity" applies to a debtor's proposed modifications regardless of the union's

conduct during negotiations, may a debtor establish the necessity of its proposed modification to totally and permanently eliminate seniority from a collective bargaining agreement, by showing only that some intrusion into the seniority system is not inherently unreasonable and that it has a need for long-term flexibility.

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IN RE: ROYAL COMPOSING ROOM, INC.,

Debtor,

NEW YORK TYPOGRAPHICAL UNION NO. 6

Petitioner,

- against -

ROYAL COMPOSING ROOM, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

New York Typographical Union No. 6 ("Typo 6" or the "Union") hereby petitions for a writ of certiorari to enable this Court to review the judgment and opinion of the United States Court of Appeals for the

Second Circuit in In re Royal Composing Room, Inc., 848 F.2d 345 (2d Cir. 1988).[1]

OPINIONS BELOW

The opinion of the bankruptcy court granting the application of Royal Composing Room, Inc. ("Royal") to reject its collective bargaining agreement with Typo 6 is reported at 62 B.R. 403 (Bkrtcy. S.D.N.Y. 1986). The opinion is reproduced in the Appendix to this petition as Appendix C. (A. 44-110)[2]

The opinion of the district court affirming the opinion and order of the bankruptcy court is reported at 78 B.R. 671 (S.D.N.Y. 1987) and reproduced in the

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1. As indicated in the caption, the parties to this proceeding are petitioner New York Typographical Union No. 6 and respondent Royal Composing Room, Inc.

2. References to the Appendix are designated parenthetically as "A. __" followed by the page number(s) on which the referenced material appears.

Appendix to this petition as Appendix B. (A. 32-43)

The opinion of the court of appeals affirming the judgment of the district court is reported at 848 F.2d 345 (2d Cir. 1988) and reproduced in the Appendix to this petition as Appendix A. (A. 1-31)

JURISDICTION

On June 16, 1986 the bankruptcy court granted Royal's application to reject its collective bargaining agreement with Typo 6. The district court affirmed the bankruptcy court's opinion and order on September 29, 1987. The judgment of the court of appeals affirming the judgment of the district court was entered on May 27, 1988. (Appendix D at A. 111-12) A timely petition for rehearing with a suggestion for rehearing en banc was filed by the Union and subsequently denied by the court of appeals on August 8, 1988. (Appendix E

at A. 113-14) A timely application for an extension of time within which to file a petition for a writ of certiorari was made to this Court and was granted by Justice Marshall on October 26, 1988. This petition is filed within the time granted by Justice Marshall. (Appendix F at A. 115) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1113 of the Bankruptcy Code, 11 U.S.C. §1113, reads in pertinent part as follows:

> (a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.
>
> (b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in

this section 'trustee' shall include a debtor in possession), shall -

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that -

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

** ** **

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms,

conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

STATEMENT OF THE CASE

Royal, one of the last unionized advertising typography shops in New York City, began to incur financial difficulties during the early 1980's. Royal Composing Room, 62 B.R. at 404, 411-412. (A. 44-46, 65-68) After seeking but failing to obtain substantial concessions in its labor agreement with Typo 6,[3] which has represented Royal's production employees since the company's inception, Royal filed

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3. The Union and its President, Bertram Powers, were instrumental in having Royal relieved from part of its obligation to contribute to the industry's Benefit and Productivity Fund, a fund established in 1975 to provide compensation and training to workers laid off as a result of the introduction of new technologies. Royal Composing Room, 62 B.R. at 408-09. (A. 58)

a Chapter 11 petition on March 14, 1986. Id. at 404, 408-409. (A. 45-46, 56-59)

Pursuant to §1113 of the bankruptcy code, the debtor in possession or the trustee (hereinafter referred to as the "employer") must, inter alia, make a proposal to a union to modify the parties' contract before applying to the bankruptcy court to reject its collective bargaining agreement. The proposal must be limited to "those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor" and must assure "that all creditors, the debtor and all of the affected parties are treated fairly and equitably . . ." 11 U.S.C. §1113(b)(1)(A).

Royal made its preapplication proposal to the Union on March 18, 1986. Royal Composing Room, 848 F.2d at 347. (A. 4) Among the modifications proposed by Royal was the total elimination of priority -- or

seniority as it is known in most union contracts -- from its collective bargaining agreement with Typo 6. Id. at 349-50. (A. 11)

The very next day, on March 19, 1986, Royal filed an application with the bankruptcy court to reject its collective bargaining agreement with Typo 6.[4] Royal Composing Room, 62 B.R. at 404. (A. 46) In less than a week Royal had filed a Chapter 11 petition, proposed modifications to its contract with Typo 6, and applied to reject its collective bargaining agreement.[5]

After a hearing on Royal's application at which Royal failed to produce any specific evidence regarding its need to

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4. The bankruptcy court had jurisdiction to entertain this application pursuant to 28.U.S.C. §§151 and 1334(a) and (b).

5. On March 18 Royal also requested interim relief from its collective bargaining agreement which was not opposed by the Union. Royal Composing Room, 62 B.R. at 409. (A. 59)

totally and permanently eliminate priority,[6] see, e.g., Royal Composing Room, 848 F.2d at 356 (Feinberg, C.J. dissenting) (A. 26), the bankruptcy court found that Royal had satisfied the requirements of §1113 and granted Royal's application to reject its collective bargaining agreement with Typo 6. Royal Composing Room, 62 B.R. at 418. (A. 94)

Although the threshold requirement for rejecting a collective bargaining agreement pursuant to §1113, is that an employer make a proposal to a union that satisfies the necessity requirements of subsection (b)(1)(A), the bankruptcy court pointedly refused to make Royal's proposal the "first and foremost topic of consideration."

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6. Royal presented conclusory testimony that a limited intrusion into priority was needed so that five employees could be laid-off without regard to seniority. Royal, however, never proved, and the bankruptcy court never found, that laying off five employees out of seniority order was necessary for Royal to reorganize successfully.

Royal Composing Room, 62 B.R. 406-07. (A. 51-54) Instead, the bankruptcy court focused upon the parties negotiating behavior prior to May 8, the date on which the hearing concerning Royal's application to reject commenced. Id. at 407-411. (A. 53-65) According to the bankruptcy court, "[a] union must articulate and discuss in detail with a debtor during the prehearing negotiations its reasons for declining to accept the debtor's proposal in whole or in part." Id. at 407. (A. 54) After considering the Union's response to Royal's pre-Chapter 11 requests for relief (when Typo 6 concededly had no obligation to consider or negotiate over modifications in its contract), the limited negotiating sessions the parties held after Royal made its proposals but before the hearing commenced,[7] and the counterproposal made by

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7. Section 1113 provides that during the period "beginning on the date" of the employer's proposal to modify its

the Union on May 5, the bankruptcy court found that the Union's posture during negotiations was essentially a "stonewall." Id. at 407-411. (A. 54-65)

The bankruptcy court then held that "in the case of a stonewall" by a union during negotiations, when considering whether an employer's proposed modifications satisfied the necessity requirements of subsection (b)(1)(A), a court "must focus on the larger picture:

(footnote continued from previous page) collective bargaining agreement and "ending on the date of the hearing" held to consider the employer's application to reject, "the [employer] shall meet, at reasonable times, with the authorized representative [of its employees] to confer in good faith in attempting to reach mutually satisfactory modifications of [the collective bargaining agreement]." 11 U.S.C. §1113(b)(2).

After Royal made its proposal to modify its contract with Typo 6, the parties met for negotiations on three occasions before the hearing commenced on May 8: March 18, April 10, and April 17. In addition, on May 5 Typo 6 made a counterproposal which was rejected by Royal. Royal Composing Room, 62 B.R. at 409-10. (A. 58-61)

whether the Debtor has shown any necessity for modifications of the magnitude it proposed ...." Royal Composing Room, 62 B.R. at 41. (A. 63-65) Pursuant to that analysis of §1113, the bankruptcy court proceeded to find (i) "that Royal established its need for relief on the order of magnitude requested" in its proposal and (ii) "that a proposal providing for some intrusion on the priority system was not inherently unreasonable." Id. at 417-18. (A. 87-94)

The bankruptcy court also explicitly rejected the standard of necessity articulated by the Third Circuit in Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America, 791 F.2d 1074 (3d Cir. 1986). The Third Circuit analyzed §1113's necessity requirements in terms of (i) how necessary the proposed modifications must be and (ii) what goal should be considered when evaluating the

necessity of an employer's proposed modifications. After a detailed analysis of the legislative history of §1113, the Third Circuit held that courts must define "necessary" as "essential" and evaluate the necessity of proposed modifications with reference to "the somewhat shorter term goal of preventing ... liquidation ... rather than the longer term issue of the debtor's ultimate future." Id. at 1081-83, 1086-89. Without any mention of the statute's legislative history, the bankruptcy court concluded that "essential" was too strict a standard and that the short term goal of preventing liquidation was too narrow a prospective from which to evaluate the necessity of an employer's proposed modifications. Royal Composing Room, 62 B.R. at 417-18. (A. 89-94)

Shortly after the bankruptcy court's decision in Royal Composing Room, the Second Circuit, in Truck Drivers Local 807

v. Carey Transportation, Inc., 816 F.2d 82 (2d Cir. 1987), also explicitly rejected the Third Circuit's holding in Wheeling-Pittsburgh. After a limited analysis of §1113's legislative history, id. at 89, the court in Carey Transportation held that (i) "necessary" should not be equated with "essential" or "bare minimum" and (ii) that an employer's proposed modifications should be evaluated with reference to the longer term goal of successfully completing its reorganization.

> In sum, we conclude that the necessity requirement places on the debtor the burden of proving that its proposal is made in good faith, and that it contains necessary, but not absolutely minimal, changes that will enable the debtor to complete the reorganization process successfully.

Id. at 90.

After finding that the standard of necessity employed by the bankruptcy court in Royal Composing Room was "in substance" the standard adopted by the Second Circuit

in Carey Transportation, the district court held that the bankruptcy court's findings of fact were not clearly erroneous and affirmed its opinion and order. Royal Composing Room, 78 B.R. at 673-74. (A. 37-41)

Without any mention of §1113's legislative history, the Second Circuit affirmed the judgment of the district court on two alternative grounds. First, it held that because the Union had stonewalled and refused to negotiate until Royal's proposal to eliminate priority was taken off the table, Royal Composing Room, 848 F.2d at 349 (A. 9), the Union could not oppose rejection by challenging Royal's proposed modification regarding priority or any other particular modification as unnecessary to Royal's successful organization.

> Put simply, where a union refuses to negotiate in order to obtain a different combination of modifications, it may not challenge

> the particular combination, or any vital element, contained in the debtor's proposal. So long as the total quantum of savings is necessary under the Carey Transportation standard, the union may not prevent rejection by belatedly attacking a specific element.

Id. at 349. (A. 10) Having failed to negotiate with an employer concerning an unnecessary modification, a union can avoid rejection only by showing "that the part of the proposal it cannot accept was included by the employer in bad faith, in an effort to stalemate negotiations and allow it to obtain outright rejection rather than a negotiated compromise." Id. at 348. (A. 8)

Alternatively, the court of appeals held that even if Typo 6 were permitted to challenge Royal's proposed modification concerning priority, it "would conclude that Royal demonstrated that it was a 'necessary modification', as that term was defined in Carey Transportation." 848 F.2d

at 350. (A. 11) Although the bankruptcy court never made "an explicit finding as to the necessity for eliminating priority", the court of appeals found it implicit in the bankruptcy court's finding that Royal required "long-term flexibility." Id. at 350. (A. 12)

After a detailed analysis of the legislative history of §1113, 848 F.2d at 352-54 (Feinberg, C.J. dissenting) (A. 16-20), Chief Judge Feinberg dissented from the majority's opinion. He criticized the majority's first holding, which prevented Typo 6 from challenging the necessity of Royal's proposal to eliminate priority, as standing §1113 on its head by requiring a union to negotiate over terms "which by no stretch of the imagination can be called 'necessary'", even when an employer has failed to meet the statute's threshold requirement by making a proposal limited to "necessary modifications ... necessary to

permit the reorganization of the debtor." Id. at 354-56. (A. 21-25) Because of the importance of priority and the lack of any "specific, factual information proving that priority had to be totally and permanently eliminated", he also rejected the majority's alternative holding that the necessity of eliminating priority was established by the bankruptcy court's finding that Royal required maximum flexibility. Id. at 356-57. (A. 25-28) Based upon that approach, according to Chief Judge Feinberg, "almost any bankrupt company could eliminate seniority without proving any particularized need." Id. at 357. (A. 27)

REASONS FOR GRANTING THE PETITION

1. The most obvious reason for granting this petition is to resolve the clear conflict between the Second and Third Circuit Courts of Appeals regarding the

interpretation of §1113's necessity requirements. The Second Circuit's decision in Royal Composing Room was premised upon its earlier holding in Carey Transportation which explicitly considered and rejected the strict standard of necessity adopted by the Third Circuit in Wheeling-Pittsburgh. This conflict undermines the important goal of uniformity in federal labor policy as it relates to the regulation of collective bargaining, and requires employers and unions outside of the Second and Third Circuits to enter into delicate negotiations concerning the survival of a financially troubled enterprise, without a clear understanding of the basic ground rules of those negotiations.

2. Even if a conflict between these courts of appeals did not exist, the Second Circuit's holding in Royal Composing Room deviates so substantially from both the

language and the intent of §1113 and impinges upon such important federal labor policy considerations, that this Court ought to grant plenary review.

(a) The Second Circuit's initial holding, that a union may not challenge any aspect of an employer's proposal as unnecessary unless it first enters into negotiations with the employer, forces a union to negotiate with an employer over proposals that have only an attenuated relationship to the employer's successful reorganization but which are clearly anathema to the union. Not only does this holding ignore the language and structure of the statute and the intent of Congress, but by permitting employers to begin negotiations with offensive and unnecessary proposals, it encourages hostile negotiations and litigated solutions.

(b) The Second Circuit's alternative holding, that an employer's generalized

need for maximum flexibility is sufficient to establish the necessity for totally eliminating seniority, forces a union to accept the total elimination of seniority without requiring an employer to establish any particularized need, or face rejection of its entire collective bargaining agreement. Seniority has long been recognized as a cornerstone of American trade unionism by both Congress and this Court, see, e.g., Franks v. Bowman Transportation Co., 424 U.S. 747, 766 (1976), and no union should be forced to accept its total elimination simply because an employer has shown that flexibility will aid its reorganization.

I. THE COURT SHOULD GRANT THIS PETITION SO THAT IT MAY RESOLVE THE CONFLICT BETWEEN THE CIRCUITS REGARDING THE INTERPRETATION OF THE NECESSITY REQUIREMENTS OF SECTION 1113 OF THE BANKRUPTCY CODE

Before permitting an employer to reject its collective bargaining agreement pursuant to §1113, a court must find that "prior to filing an application seeking rejection of a collective bargaining agreement," the employer has made a proposal to the union which only "provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization ...." 11 U.S.C. §1113(b) and (c).

As noted above, there is a conflict between the Second and Third Circuits regarding how these necessity requirements should be construed. The Third Circuit has held that necessary should be defined as essential[8] and that the necessity of an

8. According to Webster's Ninth New Collegiate Dictionary "necessary" has the

employer's proposed modifications should be evaluated with reference to the short term goal of preventing the employer's liquidation. Wheeling-Pittsburgh, 791 F.2d at 1088-89. The Second Circuit explicitly rejected the Third Circuit's necessity standard and held that necessary should be defined as almost necessary, i.e. necessary, but not absolutely minimal, and that the necessity of an employer's proposed modifications should be evaluated with reference to the longer term goal of allowing the employer to reorganize successfully.[9] Carey Transportation, 816

(footnote continued from previous page) following meanings: an indispensable item; essential; of an inevitable nature; inescapable; compulsory; absolutely needed; and required.

9. Considering the long term perspective implicit in Royal's proposal to totally eliminate priority, and Royal's failure to present any specific evidence establishing the need to completely eliminate priority, it is fairly obvious that a court applying the standard of necessity adopted by the Third Circuit in Wheeling-Pittsburgh, would not have granted Royal's application to

F.2d at 88-90.[10] With the Second Circuit's opinion in the Royal case, this split with the Third Circuit has widened as Carey's standard has been shown to be so malleable as to permit employers to propose

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(footnote continued from previous page) reject its collective bargaining agreement with Typo 6.

10. The Carey Transportation court also argued that requiring an employer to propose essential modifications at the outset would make it virtually impossible for an employer to fulfill its statutory obligation to bargain with a union in good faith over its proposal. Carey Transportation, 816 F.2d at 89.

> Because the statute requires the debtor to negotiate in good faith over the proposed modifications, an employer who initially proposed truly minimal changes would have no room for good faith negotiating, while one who agreed to any substantive changes would be unable to prove that its initial proposals were minimal.

Id.

This argument, however, ignores the fact that even after an employer proposes truly minimal changes in a collective bargaining agreement, it can still negotiate with a union over alternative modifications which would yield a similar amount in savings.

eliminating fundamental features of American collective bargaining agreements, such as seniority or arbitration, even though their elimination adds little to an employer's prospects of successfully reorganizing and mortally wounds a union and the employees it represents.[11]

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11. The holding in Wheeling-Pittsburgh is based upon an analysis of §1113's legislative history far more detailed than the cursory overview undertaken by the court in Carey Transportation. Compare Wheeling-Pittsburgh, 791 F.2d 1081-83, 1086-88 with Carey Transportation, 816 F.2d at 89. But however parsed, the legislative history cannot support the result in Royal as ultimately that history "reinforces what is implied by the statutory language itself: Congress intended section 1113 to make rejection of signed labor contracts difficult (but not impossible) and was especially concerned that bankruptcy not become a union-busting tool." Royal Composing Room, 848 F.2d at 352 (Feinberg, C.J. dissenting). (A. 15-16) Nonetheless the legislative history does not contain any committee reports which this Court has found to be the most reliable source for determining Congressional intent. See, e.g., Garcia v. United States, 469 U.S. 70, 76 (1984). Thus, notwithstanding that the sequence of legislative events clearly supports the Third Circuit's view of the statute, the legislative history is otherwise comprised primarily of individual commentary by Congressmen which, if taken

This conflict also undermines the important policy of uniformity in federal regulation of collective bargaining. Lower courts outside of the Second and Third Circuits have endorsed both approaches. See, e.g., In re Amherst Sparkle Market, Inc., 75 B.R. 847 (Bkrtcy. N.D. Oh. 1987) (adopting the Carey Transportation standard); In re Mile High Metal Systems, Inc., 67 B.R. 114 (D. Colo. 1986) (adopting the Wheeling-Pittsburgh standard). Employers and unions not within the Second and Third Circuits' jurisdiction must enter into the delicate negotiations required by §1113 without knowing which standard of

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(footnote continued from previous page)
out of context or considered in isolation, may be mistakenly viewed as evidence of a less restrictive Congressional intent. Accordingly, this Court should definitively reconcile the conflict between the Circuits rather than wait for further appellate authority which may rely on selective and unrepresentative citations to the legislative debates, as the bankruptcy court did below, to support an erroneous view of the statute.

necessity will be applied. For those who miscalculate the costs can be devastating: The rejection of a collective bargaining agreement or the liquidation of a financially troubled enterprise. Thus, clarification in this unsettled area is critical.

II. IN CONTRAVENTION OF CLEAR STATUTORY LANGUAGE, LEGISLATIVE HISTORY AND PRIOR JUDICIAL HOLDINGS, THE SECOND CIRCUIT ERRONEOUSLY PRECLUDED THE UNION FROM CHALLENGING THE NECESSITY OF ROYAL'S PROPOSAL TO TOTALLY ELIMINATE PRIORITY

The Second Circuit's holding in Royal Composing Room deviates so significantly from the statutory scheme developed by Congress that this Court ought to grant plenary review.

The Second Circuit held that where a union refuses to negotiate in order to obtain a different combination of modifications than those proposed by an

employer,[12] it may not oppose rejection by challenging a specific modification as unnecessary to the employer's successful reorganization. Royal Composing Room, 848 F.2d at 349. (A. 10) Having failed to negotiate with an employer concerning an unnecessary modification, a union, according to the Second Circuit, can avoid rejection only by showing "that the part of the proposal it cannot accept was included by the employer in bad faith, in an effort to stalemate negotiations and allow it to obtain outright rejection rather than a negotiated compromise." Id. at 348. (A. 8)

This holding contradicts the clear language and intent of §1113. First, it erroneously ignores the statutory

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12. Any suggestion by the majority that the Union totally failed to negotiate is not supported by the record. Although the bankruptcy court found that the Union "stonewalled" during negotiations, it also found that the parties engaged in limited negotiations. Royal Composing Room, 62 B.R. at 409-10.

requirement that the employer demonstrate that each of its proposed modifications is necessary for its reorganization. Second, it incorrectly embraces a shifting standard of necessity that looks to a union's negotiating record to determine what standard of necessity will be applied by a court in evaluating an employer's proposal. Third, it mistakenly permits unnecessary anti-union modifications to be part of court-approved proposals. Fourth, it improperly requires a union to show that a proposed modification was both unnecessary and made in bad faith, when Congress clearly placed the burden on employers to prove that their proposed modifications were necessary and rejected without good cause. Fifth, it inappropriately discourages negotiated settlements and encourages litigation by permitting employers to set the stage for negotiations with proposed modifications that bear

little relation to an employer's successful reorganization but which are anathema to most unions.

1. Notwithstanding the Second Circuit's holding to the contrary, §1113 requires courts to evaluate the necessity of the modifications proposed by an employer rather than the necessity of the proposal as a whole. The employer is required to make a proposal "which provides for those necessary modifications ... necessary to permit the reorganization of the debtor." 11 U.S.C. §1113(b)(1)(A). If Congress had only intended to require a employer to establish the necessity of its proposal as a whole, it would not have explicitly required that the proposal consist of "necessary modifications."

The statute's legislative history is replete with references to the requirement that the employer only propose necessary modifications. As noted by Senator

Packwood, "only modifications which are necessary to a successful reorganization may be proposed" by an employer. See 130 CONG. REC. S8898 (daily ed. June 29, 1984). As explained by Representative Morrison, the author of the language eventually adopted by Congress, "the trustee must limit his proposal to modify a collective bargaining agreement to only those modifications that must be accomplished if the reorganization is to succeed." Id. at H7496.[13] Nowhere in the statute's legislative history is it suggested that unnecessary modifications may be part of an employer's proposal, so long as the proposal as a whole is necessary for the employer's successful reorganization.

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13. The Morrison explanation was introduced in written form in the Senate during that body's consideration of the conference committee's report. See 130 CONG. REC. S8899 (daily ed. June 29, 1984) (Sen. Kennedy).

Ignoring the necessity of an employer's proposed modifications also conflicts with prior decisions by other courts. Other than the Royal line of cases, petitioner is aware of no decisions in which a court has refused to evaluate the necessity of an employer's proposed modifications, even when a union has failed to engage meaningfully in negotiations. See, e.g., Carey Transportation, 816 F.2d 82 (2d Cir. 1987); In re Mile High Metal Systems, Inc., 67 B.R. 114 (D. Colo. 1986).

2. The Second Circuit's approach also erroneously endorses a shifting standard of necessity based upon a court's evaluation of a union's negotiating record: focusing on the individual modifications if the union engages in meaningful negotiations and on the proposal as a whole if it does not. The statute, however, has only one necessity standard and provides no basis upon which to conclude that a union's

negotiating posture should govern the definition or application of that standard. Moreover, by requiring courts to evaluate proposed modifications made by a debtor "[s]ubsequent to filing a petition [for bankruptcy] and prior to filing an application seeking rejection of a collective bargaining agreement," 11 U.S.C. §1113(b)(1), it is evident that Congress intended courts to evaluate the necessity of an employer's proposed modifications independently of the post-application negotiations relied upon so heavily by the Second Circuit.[14]

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14. Even if the statute could be construed as permitting a court to consider a union's post-petition, pre-application negotiating posture when evaluating the necessity of an employer's proposed modifications, here the employer gave the Union no time to negotiate before applying to reject its collective bargaining agreement. Royal made its proposal on March 18 and filed its previously prepared application for rejection the very next day. See Royal Composing Room, 848 F.2d at 354 n. 2 (Feinberg, C.J., dissenting). (A. 22)

If the application of the statute's

Although the statute does require employers to negotiate with employee representatives, see §1113(b)(2), nowhere does it obligate a union to negotiate regardless of the employer's proposed modifications. In fact, the opposite is true. As noted by Chief Judge Feinberg in dissent:

> [T]he point of the requirement that the proposal contain only "necessary" modifications is to limit when a union can be required to reopen and renegotiate an already signed contract.
>
> In contrast, the majority requires unions to negotiate over terms that save nothing -- which by no stretch of the imagination can be called "necessary" -- even though those terms mortally wound the union, because

---

(footnote continued from previous page) necessity and good cause standards are both going to be dependent upon a union's negotiating posture, then the employer ought to be required to give the union an opportunity to negotiate before taking the inflammatory step of attempting to abrogate the contract completely. See Carey Transportation, 816 F.2d at 92 (analysis of good cause provision which "adds nothing to other substantive requirements of the statute", proper where a union has not participated meaningfully in post-petition negotiations).

> refusal to negotiate over a specific term bars the union from objecting to that term at the subsequent rejection hearing.

Royal Composing Room, 848 F.2d at 354 n. 2 (Feinberg, C.J., dissenting). (A. 22-23)

Moreover, the Second Circuit's refusal to consider the necessity of an employer's proposed modifications independently of a union's post-application negotiating posture, represents yet another departure from the approach to §1113 taken by other courts. Except for the Royal line of cases, petitioner is aware of no decisions in which an employer's proposal was evaluated with reference to a union's stance in negotiations. Even prior Second Circuit decisions held that the first issue a court must address in considering an employer's rejection application is whether the employer's proposed modifications satisfied the statute's necessity requirements. See Carey Transportation,

816 F.2d at 88; In re Century Brass Products, Inc., 795 F.2d 265, 273 (2d Cir.), cert. denied, __ U.S. __, 107 S.Ct. 433, 93 L.Ed.2d 383 (1986). As stated by the court in Mile High Metal Systems:

> [The approach adopted by the bankruptcy court in Royal Composing Room] is directly contrary to the mandate of the statute, which makes it incumbent upon a debtor to make a proposal which meets all of the requirements of the Code.

67 B.R. at 118-19.

3. By prohibiting a union which has failed to negotiate to a court's satisfaction from challenging an employer's proposed modifications, the majority also inappropriately permits unnecessary anti-union modifications to be part of court-approved proposals. As noted by Chief Judge Feinberg in dissent, the majority's statutory interpretation thereby undercuts Congressional intent and ignores prior Second Circuit holdings.

> The majority thus allows individual anti-union modifications that save

> management little to lurk in court-approved proposals. The majority thereby disrupts the scheme of section 1113, since it effectively eliminates the word "necessary" from subsection (b)(1)(A) and leaves only the good faith and balance of the equities clauses to protect the union. This was not the result Congress intended when it overruled Bildisco, which said that only balancing the equities was required. The majority's rule also violates Truck Drivers Local 807 v. Carey Transportation, Inc., 816 F.2d 82 (2d Cir. 1987), in which we held that a management proposal must be limited to "necessary, but not absolutely minimal" modifications, since under the majority's rule, even modifications that do not significantly help the reorganization are permitted.

Royal Composing Room, 848 F.2d at 355 (Feinberg, C.J. dissenting). (A. 24)

4. The majority's attempt to ameliorate this flaw in its analysis by giving unions the opportunity to prove that an unnecessary modification was proposed by an "employer in bad faith, in an effort to stalemate negotiations and allow it to obtain outright rejection rather than a negotiated compromise," 848 F.2d at 348 (A.

8), only widens its departure from the statutory scheme enacted by Congress and the prior holdings of numerous other courts. The statute and the case law clearly require the employer to shoulder the burden of proving that its proposal contained only necessary modifications, that the union refused to accept its proposal without good cause and that the balance of equities favors rejection of the contract. See, e.g., Carey Transportation, 816 F.2d at 88; Century Brass, 795 F.2d at 276. Nowhere does the statute require the union to prove bad faith on the part of the employer. To require a union to show that a modification was both unnecessary and proposed in bad faith totally distorts the balance struck by Congress when, in reaction to N.L.R.B. v. Bildisco, 465 U.S. 513 (1984), it made it more difficult for

employers to reject their collective bargaining agreements.[15]

5. The Second Circuit implicitly seeks to justify its departure from the literal language of §1113, the statute's legislative history and the prior holdings of other courts, by relying upon the intent of Congress to encourage negotiated settlements between employers and unions rather than litigated solutions that result in the rejection of collective bargaining agreements. Royal Composing Room, 848 F.2d at 349. See also Royal Composing Room, 62 B.R. at 405-06, 411 ("In addition to the legislative intent discussed previously, both equity and conservation of judicial resources favor an interpretation of Code

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15. Moreover, as noted by Chief Judge Feinberg in dissent, "management may make a good-faith mistake in thinking its proposal is necessary. The good-faith provisions therefore do not substitute for the necessity requirement." Royal Composing Room, 848 F.2d at 355 (Feinberg, C.J. dissenting). (A. 24)

§1113(c) that promotes effective pre-hearing negotiations."). (A. 47-52, 64-65) Yet the approach adopted by the Second Circuit actually undermines this goal. By encouraging employers to enter into negotiations by proposing modifications that are offensive to any union even though they bear little relation to an employer's successful reorganization, the Second Circuit's holding will more often than not lead to hostile negotiations, deadlock, and the necessity for court intravention. Such an approach undermines the statutory scheme developed by Congress to discourage litigation and encourage negotiated solutions.

In §1113 Congress balanced the need of employers for quick and permanent relief from aspects of their collective bargaining agreements with the federal policy favoring negotiated settlements in collective bargaining rather than government mandated

solutions. It did so by requiring employers to propose modifications in their union contracts and negotiate in good faith with unions over those modifications, but then limiting the time period during which employers must negotiate before obtaining permanent judicially approved relief. In most cases, the period of required negotiations need only last fifteen days.[16]

Critical to this scheme is the statutory requirement that employers begin negotiations with narrowly tailored

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16. An employer is permitted to apply for rejection of a collective bargaining agreement immediately after making its proposal to a union, just as Royal did here. 11 U.S.C. §1113(b)(1). Once a hearing commences on the employer's application to reject, the employer's obligation to negotiate in good faith ends. 11 U.S.C. §1113(b)(2). In most cases the hearing must begin within fourteen days after the employer files its application to reject. 11 U.S.C. §1113(d)(1). The court may delay the hearing for an additional seven days, "where the circumstances of the case, and the interests of justice require." Id. After that additional seven days, however, the hearing may be delayed only if the employer and the union agree to do so. Id.

proposals. By requiring employers to limit their proposals to "necessary modifications ... necessary to permit the reorganization of the debtor," Congress attempted to assure the success of this short period for negotiations by preventing employers from using bankruptcy as a tool to rewrite collective bargaining agreements in ways that would undermine the entire collective bargaining relationship while adding little to the prospects of a successful reorganization. Thus, the statutory limits on the scope of the employer's proposal serve to prevent negotiations from immediately becoming deadlocked, as they did here, over modifications which are offensive to the union but which contribute little to an employer's successful reorganization.

The approach to §1113 adopted by the Second Circuit, however, totally undermines this statutory scheme. It permits

employers to propose offensive, unnecessary modifications which quickly lead to deadlock, as Royal's proposal on priority did here, thereby discouraging negotiated settlements and promoting litigation.

III. THE MAJORITY'S HOLDING THAT ROYAL DEMONSTRATED THAT ITS PROPOSAL TO TOTALLY ELIMINATE PRIORITY WAS A "NECESSARY MODIFICATION" ERRONEOUSLY PERMITS ALMOST ANY BANKRUPT COMPANY TO ELIMINATE SENIORITY WITHOUT ESTABLISHING ANY PARTICULARIZED NEED AND THEREFORE INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE IN FEDERAL LABOR LAW

Priority -- called seniority in most union contracts -- has become one of the chief cornerstones of American trade unionism. Seniority is often the only equity workers have in a company and it is one of the chief protections workers have from arbitrary management decision making. Seniority prevents the indiscriminate denial of employment by dictating that layoffs and recalls to work be accomplished

in seniority order. Only seniority assures an employee that after twenty or thirty years of loyal service, he will not be replaced by a newly hired employee.[17] As the Supreme Court has said, "'[m]ore than any other provision of the collective bargaining agreement ... seniority affects the economic security of the individual employee covered by its terms.'"[18] Franks v. Bowman Transportation Co., 424 U.S. 747, 766 (1976).

Notwithstanding the importance of seniority principles in general and to the

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17. "[Seniority] is so important that the union president in this case said he was willing to 'take whatever wage cut is necessary to keep this firm in business, but I don't think we should be asked to give up [seniority] for that purpose.'" Royal Composing Room, 848 F.2d at 356 (Feinberg, C.J. dissenting). (A. 25-26)

18. The need for this protection is best illustrated by Royal's conduct. Although professing a need to layoff only five employees, within a week of the bankruptcy court's decision, Royal terminated (without recall rights) 18 of its 32 union employees.

Union here in particular, see Royal Composing Room, 848 F.2d at 356, (Feinberg, C.J., dissenting), (A. 25-26) Royal proposed the total elimination of priority. Even assuming, arguendo, that Royal presented sufficient evidence of a need to layoff five employees without regard to priority, it presented absolutely no evidence that it needed to ignore priority when making future layoffs or when rehiring or recalling employees during its reorganization. Id. (A. id.) In short, Royal presented no evidence supporting the necessity of its proposal to totally eliminate priority.

The only factual finding explicitly made by the bankruptcy court concerning the necessity of Royal's proposal to eliminate priority, was the observation that "a proposal providing for some intrusion on the priority system was not inherently unreasonable." Royal Composing Room, 62

Bankr. at 417. (A. 87-88) This, however, as the Second Circuit admits, did not constitute "an explicit finding as to the necessity for eliminating priority." Royal Composing Room, 848 F.2d at 350. (A. 11) The bankruptcy court applied a standard of reasonableness rather than a standard of necessity and, in any event, did not address the employer's proposal to totally eliminate priority.

Nevertheless, the Second Circuit held that since the bankruptcy court found that Royal required maximum flexibility, it implicitly found that Royal's proposal to totally eliminate priority was necessary for its successful reorganization.

> Thus, the bankruptcy court began with the conclusion that priority was not off-limits, because changes in priority "are not inherently unreasonable."
>
> But the bankruptcy court did not stop there. It went on to explain the need to eliminate, rather than merely modify, priority, in terms of Royal's need for flexibility in assignments and lay-offs. Judge Abram wrote, "The

> Debtor will in the future be faced with enormous competitive pressure which will require it to have maximum flexibility, including with respect to utilization of its unionized labor, in order to mold and adapt in a changing business environment."

Royal Composing Room, 848 F.2d at 350. (A. 12) Nor did it trouble the court of appeals that, as Chief Judge Feinberg observed, "there was no specific, factual information proving that priority had to be totally and permanently eliminated." Id. at 356 (Feinberg, C.J., dissenting). (A. 26) Having a need for flexibility was deemed sufficient by the majority to establish the necessity of totally eliminating priority.

> As Judge Abram noted, "Projections are necessarily speculations about the future and are an art, rather than a science." ... We will not hold Royal to show the necessity of every conceivable future use of the flexibility it now requires; it is enough that the bankruptcy court found it needs that flexibility.

Id. at 350. (A. 13)

As noted by Chief Judge Feinberg in dissent, however, truisms concerning

management's need for flexibility and the speculative nature of future projections do not constitute the evidence of necessity required by §1113. Royal Composing Room, 848 F.2d at 356-57 (Feinberg, C.J., dissenting). (A. 26-28) Seniority is so important to trade unions that demonstrating the necessity of its total elimination requires a stronger showing than that made here by Royal. Id. (Feinberg, C.J., dissenting). (A. 25-28) Indeed, under the reasoning endorsed by the Second Circuit, almost any bankrupt company could justify totally eliminating seniority without showing any particularized need to do so. Unions would thus be forced to accept the total elimination of seniority or face the prospect of an employer being permitted to reject the entire collective bargaining agreement. That, however, was not the intent of Congress when it enacted the strict requirements of §1113.

The [bankruptcy court's] first finding -- that "some intrusion on the priority system was not inherently unreasonable" -- does not even approach a finding that total elimination of priority is necessary. The second statement -- about the "enormous competitive pressure" requiring "maximum flexibility" -- is so general as to be meaningless. It could be said of any bankrupt company, since presumably a company would not be bankrupt without "enormous competitive pressure" and since management always wants to have "maximum flexibility." Indeed, one of a union's key functions is to decrease management's flexibility by giving workers a role in their own work, and increasing flexibility is often code for ending unionization. Similarly, under the bankruptcy court's reasoning, almost any bankrupt company could eliminate seniority without proving any particularized need. Congress did not intend Section 1113 to be management's tool for eliminating seniority provisions. Instead, Congress required the employer to prove specific facts showing that the specific relief requested is necessary in its particular circumstances. On this record, the employer never met its burden, the bankruptcy court applied the wrong standard and, in any event, did not make particularized findings. At the very least, I would remand for further factual findings.

Id. at 357. (A. 27-28)

Thus, the Second Circuit's opinion can only encourage what occurred here: without a showing of particularized need, an employer was able to permanently discharge 18 of its 32 union employees, leaving them without even their seniority right to be recalled in the event their employer successfully reorganized. Plainly, this result turns the statute on its head and leads to the very union-busting tactics section 1113 was designed to prevent.

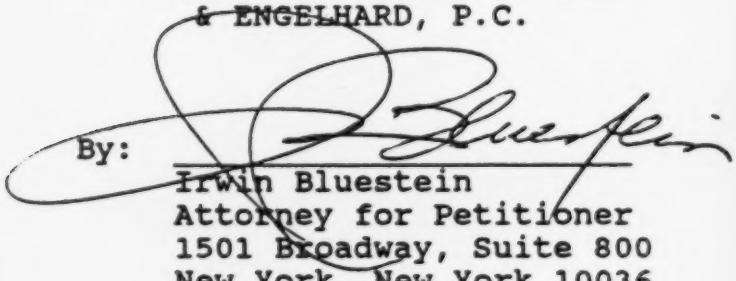
CONCLUSION

For all of the reasons provided above, this petition for a writ of certiorari should be granted.

Dated: New York, New York
December 5, 1988

Respectfully submitted,

VLADECK, WALDMAN, ELIAS
& ENGELHARD, P.C.



By: _____
Irwin Bluestein
Attorney for Petitioner
1501 Broadway, Suite 800
New York, New York 10036
(212) 354-8330

Of Counsel:
Vladeck, Waldman, Elias
& Engelhard, P.C.
Attorneys for Petitioner

On the Petition:
Daniel Engelstein
Stuart E. Bauchner

88-1108

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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

IN RE: ROYAL COMPOSING ROOM, INC.,

Debtor,

NEW YORK TYPOGRAPHICAL UNION NO. 6

Petitioner,

against

ROYAL COMPOSING ROOM, INC.,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRWIN BLUESTEIN
(Counsel of Record)
Attorney for Petitioner
1501 Broadway, Suite 800
New York, New York 10036
(212) 354-8330

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 779—August Term 1987

Argued: February 22, 1988 Decided: May 27, 1988

Docket No. 87-5043

IN RE: ROYAL COMPOSING ROOM, INC.,

Debtor,

NEW YORK TYPOGRAPHICAL UNION NO. 6,

Plaintiff-Appellant,

—against—

ROYAL COMPOSING ROOM, INC.,

Defendant-Appellee.

Before:

FEINBERG, *Chief Judge*, PRATT, *Circuit Judge*, and MCLAUGHLIN, *District Judge* for the Eastern District of New York, sitting by designation.

Appeal from a judgment of the United States District Court for the Southern District of New York, John F.

Keenan, *Judge*, affirming a judgment of the bankruptcy court, granting application of debtor Royal Composing Room, Inc., to reject its collective bargaining agreement with New York Typographical Union Local No. 6, pursuant to § 1113 of the bankruptcy code.

Affirmed. Chief Judge Feinberg dissents in a separate opinion.

DANIEL ENGELSTEIN, New York, NY (Stuart E. Bauchner, Vladeck, Waldman, Elias & Engelhard, P.C., New York, NY, David Silberman, AFL-CIO, Washington, DC, of Counsel), *for Plaintiff-Appellant*.

MICHAEL D. HESS, New York, NY (Marjorie L. Cohen, Owen C. Pell, Brian G. Hart, White & Case, New York, NY, of Counsel), *for Defendant-Appellee*.

PRATT, *Circuit Judge*:

For the second time in a year we are called upon to interpret § 1113 of the bankruptcy code, 11 U.S.C. § 1113 (1987 West Supp.), and the circumstances under which a debtor may reject a collective bargaining agreement as part of its reorganization. As in *Truck Drivers Local 807 v. Carey Transportation*, 816 F.2d 83 (2d Cir. 1987), we affirm the judgment of the district court, which upheld the bankruptcy court's determination that the debtor, Royal Composing Room, Inc. ("Royal"), had met the requirements of § 1113 and granted Royal's application to reject

its agreement with New York Typographical Union Local No. 6 ("the union").

BACKGROUND

Over the last 10 years, there have been enormous changes in the printing industry. The traditional method of printing with linotype machines has been replaced by faster, cheaper methods of computer printing that have revolutionized the market.

As with most technological innovations, those in the printing industry created opportunities for some and dilemmas for others. One of those facing difficult choices was Royal, which had been a leader in the specialized field of advertising typography.

Foremost among these choices was what to do about its relatively high labor costs. Royal was faced with a unionized work force in an industry wherein its new competitors were not unionized, resulting in Royal being unable effectively to meet the market price for its product. As the bankruptcy court noted, "Royal * * * is one of the last unionized advertising typography shops in New York City." *In re Royal Composing Room, Inc.*, 62 B.R. 403, 404 (Bkrtcy. S.D.N.Y. 1986). The problem was exacerbated by seniority rules—known in the industry as "priority"—which obligated Royal to retain its most senior employees, even though they were trained on and most qualified for the now-outdated linotype machines.

These pressures caused a gradual deterioration in Royal's financial condition. From 1976 to 1985, its gross receipts declined from $7.8 million to $5.9 million; after posting a profit in every year between 1976 and 1981 except one, it has lost money every year since 1982. As the

bankruptcy court found, when Royal filed its chapter 11 petition on March 14, 1986, it was "virtually at the last moment its tangible assets were sufficient to pay its liabilities." *Royal Composing Room*, 62 B.R. at 411. The court went on to sum up Royal's problems:

> Royal is an economic anachronism. * * * [A] survey [was] conducted in March 1986 which revealed that type buyers are extremely cost conscious and that the large number of non-union producers has driven prices down to the point where the market price is below the cost per unit of a union shop such as Royal. * * * If Royal meets the market price, it can operate at capacity but it will lose money. If Royal keeps its present prices, volume will drop, and Royal will also lose money.

Id. at 412 (summarizing and accepting testimony of Dr. Ralph Gray).

Based on these difficulties, and similarly dismal projections of future losses, Royal in 1985 began to seek concessions from the union. *See id.* at 408. For reasons disputed by the parties, the union was unwilling to grant any relief to Royal, leading the company to file its bankruptcy petition in March, 1986.

Under § 1113 of the bankruptcy code, a debtor must make a proposal to the union before it applies to the bankruptcy court to reject a collective bargaining agreement. The proposal must be limited to "those necessary modifications in the employees' benefits and protections that are necessary to permit the reorganization of the debtor * * * ." 11 U.S.C. § 1113(b)(1)(A). Royal made its pre-rejection proposal on March 18, 1986.

From that date through May 8, the parties engaged in limited negotiations, characterized by what Judge Abram

termed "a stonewall" position adopted by the union. *Royal Composing Room*, 62 B.R. at 408. The union made only one counter-proposal, that coming on May 5, at the final pretrial conference. As to that proposal, the bankruptcy court found that it "provided significantly less economic relief to the Debtor than the interim relief which had been granted on March 21 * * * ." *Id.* at 410. Between March 18 and May 8, there were only two short negotiating sessions, and the blame for the lack of a real effort to reach an accommodation was laid squarely upon the union by Judge Abram. *Id.* at 409 ("The Debtor was continuously available for and sought meetings. * * * At no time prior to May 5, did the union make a counter-proposal, comment item by item on the Debtor's financial situation, or state any reasons why it found the Debtor's request to be unfair or inequitable." (footnote omitted)).

Trial commenced on May 8. The union concentrated its efforts on demonstrating that Royal did not require the savings it had sought in its March 18 proposal, and therefore that the proposal was not limited to "necessary modifications" to the agreement.

The bankruptcy court, however, concluded that Royal's proposal was necessary to its successful reorganization, thereby clearing the threshold requirement for obtaining approval to reject its union contract. The court reasoned that where the union rejects the debtor's proposal without good cause, and does not engage in good faith negotiations toward a compromise, and the "debtor is in need of substantial relief", 62 B.R. at 408, the case for rejection of the contract is at its strongest, under the "balance of the equities" test contained in § 1113. 11 U.S.C. § 1113(c)(3).

The bankruptcy court went on to evaluate the debtor's need for relief of the scope represented by its proposal,

finding that the charges were not "inherently unreasonable" and concluding that Royal's recent history of lost business and operating losses, combined with bleak projections about its future, made plain "that Royal established its need for relief on the order of magnitude" contained in its proposal. *Id.* at 418. Despite the somewhat inartful phrasing, the conclusion that the proposal was limited to necessary modifications is clear, and the court granted Royal's application to reject its union contract. The district court affirmed, and this appeal followed.

DISCUSSION

On appeal, the union has narrowed the focus of its attack on Royal's proposal. It now contends that Royal failed to show the necessity for eliminating priority. The union implicitly argues that if any single vital element of the proposal—such as the elimination of priority—cannot be shown to be necessary within the meaning of § 1113, the entire proposal cannot be deemed "necessary", and rejection of the contract must be denied. We reject the union's argument on two grounds. First, we disagree with its reading of § 1113, and hold that, at least in these circumstances, the focus should be on the proposal as a whole. Second, the bankruptcy court's conclusion that Royal had, in fact, shown the necessity for eliminating priority amply is supported by the record and therefore is not clearly erroneous.

I. *The Meaning of "Necessary" in § 1113.*

The term "necessary" appears twice in § 1113. It requires the pre-rejection proposal to contain only "necessary modifications", and that the proposal be "necessary to permit the reorganization of the debtor." 11 U.S.C.

§ 1113(b)(1)(A). We have interpreted the necessity requirement of § 1113 as placing upon a debtor "the burden of proving that its proposal is made in good faith, and that it contains necessary, *but not absolutely minimal*, changes that will enable the debtor to complete the reorganization process successfully." *Carey Transportation*, 816 F.2d at 90 (emphasis added). That the approach followed by the bankruptcy court below was consistent with the one later adopted by this court in *Carey Transportation* is at least indicated by the fact that Judge Altimari's opinion quotes, fairly extensively and approvingly, from Judge Abram's opinion in the instant case. *See id.* at 89-90.

This conclusion is buttressed by the general inconsistency between holding, as we did in *Carey Transportation*, that the debtor's proposal need not be limited to "absolutely minimal" modifications, and holding, as the union would now have us do, that each and every vital element of the debtor's proposal must be shown independently to be necessary. At the least, focusing on a particular element vital to the proposal when the union does not bargain to change that element, rather than on the necessity for the package taken *in toto*, would undermine the interpretation of § 1113 articulated in *Carey Transportation*.

At first blush, there seems to be some merit to the union's contention. If a particular element of the debtor's proposal is not needed, the proposal would seem not to be limited to necessary modifications—by definition, it would include an unnecessary modification.

Under that tautological reading of the statute, however, no proposal could ever truly be "necessary", since any single vital element of a proposal can hardly be "necessary" if it can be replaced by some alternative not included in the package which would achieve the same dollar sav-

ings for the debtor. Or, the union, as here, could argue that a specific element could substantially be modified, rather than eliminated, to achieve virtually the same savings and the same likelihood of a successful reorganization. In other words, the union's construction of the statute would enable it to play "hit-and-run": refusing to negotiate toward a compromise, safe in the knowledge that it will almost certainly be able to defeat a rejection application by attacking some vital modification by saying that it cannot be "necessary" if reasonable substitutes could have been offered. *See Royal Composing Room*, 62 B.R. at 407 ("[T]he rejection process becomes a game of Russian roulette in which the union will stand mute during negotiations in the expectation that the court is apt to find some aspect of the debtor's proposal unnecessary * * *.").

This is not to say that the union is always necessarily bound by the particular elements chosen by the debtor. If the debtor proposes an element objectionable to the union, the union has two options under § 1113. It can argue that the part of the proposal it cannot accept was included by the employer in bad faith, in an effort to stalemate negotiations and allow it to obtain outright rejection rather than a negotiated compromise. If the union can make such a showing, the debtor would not be entitled to reject the labor contract under *Carey Transportation*, 816 F.2d at 90. The union attempted here to make such a showing in the bankruptcy court, *see Royal Composing Room*, 62 B.R. at 411, but the court explicitly rejected the argument, and the union does not challenge this finding as clearly erroneous.

Alternatively, the union can negotiate with the debtor. Although this is plainly what congress was seeking to en-

courage when it passed § 1113, *see id.* at 405-06 (reviewing legislative history); *In re Mile Hi Systems, Inc.*, 51 B.R. 509 (Bkrtcy. Colo. 1985), *rev'd on other grounds*, 67 B.R. 114 (D. Colo. 1986), it is apparent from Judge Abram's opinion below that this alternative was for some reason unacceptable to Local 607. If the union believes that a vital part of the proposal is unacceptable, it should enter into good faith negotiations aimed at moderating that element, or at substituting a measure less offensive to the union but achieving comparable savings for the debtor.

But, in this case, the union refused even to discuss the issue. Not only did the union take the position that priority was nonnegotiable; it went still further and refused to negotiate *at all* until priority was taken out of Royal's proposal. *Id.* at 410.

A union certainly is entitled to adopt a hard-line position, but if, as in this case, the union does so, it must recognize the risk inherent in the strategy. The balance of the equities nearly always will tip in favor of the party that seeks to reach a compromise and to that end negotiates in good faith. 11 U.S.C. § 1113(c)(3). This is particularly true where, as here, the debtor not only seeks to negotiate in good faith, but also has adopted numerous cost-saving measures to try to improve the situation before declaring bankruptcy and seeking concessions from the union. *See Royal Composing Room*, 62 B.R. at 412 ("Union labor cost, Royal's single largest expense, is the only expense that has not been cut in the last four years."); *In re Royal Composing Room*, 78 B.R. 671, 672 (S.D.N.Y. 1987) ("As of the end of 1985, Local 6 had not yet made any sacrifices or concessions."). *Cf. In re Kentucky Truck Sales*, 52 B.R. 797, 799 (Bkrtcy. W.D. Ky. 1985) (crediting as important testimony that "the debtor has already made

nearly all possible cost cuts in the nonlabor areas of its operation''). Moreover, the rejection of the proposal by the union in such circumstances will almost always without exception be without good cause, another prerequisite to the debtor obtaining rejection of the contract. 11 U.S.C. § 1113(c)(2).

Put simply, where a union refuses to negotiate in order to obtain a different combination of modifications, it may not challenge the particular combination, or any vital element, contained in the debtor's proposal. So long as the total quantum of savings is necessary under the *Carey Transportation* standard, the union may not prevent rejection by belatedly attacking a specific element.

In terms of § 1113, the burden on the parties to negotiate is best analyzed under § 1113(c)(2), which permits rejection of the agreement only if the union has rejected the debtor's proposal without good cause. If the union seeks to negotiate compromises that meet its needs while preserving the debtor's required savings, it would be unlikely that its rejection of the proposal could be found to be lacking good cause. If, on the other hand, the union refuses to compromise, it is as unlikely it could be found to have acted with good cause.

Thus, the union here must stand or fall on the overall necessity of Royal's proposal. There is, however, no doubt that the district court's finding that Royal requires the full measure of savings represented in its proposal—and perhaps more—is not clearly erroneous. The total savings projected by Royal from its pre-rejection proposal was $4,000,778, for the years 1986-1989. *See Royal Composing Room*, 62 B.R. at 414. This amount was less than its projected losses operating under the union contract. *Id.* It may be true that the same goal might have been reached

via a different route, had the union been willing to point the way it preferred. But Royal's chosen route was found to have been offered in good faith, and to cover the necessary, if not absolutely minimal, distance Royal had to travel. No more is necessary to justify rejection under § 1113, as interpreted by *Carey Transportation*.

II. *The Necessity of Eliminating Priority.*

Even if we were to view the proper focus to be on the single element of eliminating priority, we would conclude that Royal demonstrated that it was a "necessary modification" as that term was defined in *Carey Transportation*. The bankruptcy court did not make an explicit finding as to the necessity for eliminating priority; nevertheless, such a finding is implicit in Judge Abram's opinion, and fully is supported by the record.

One of the major difficulties facing Royal was the relative inflexibility it had in utilizing its work force. The company had reached the point where it was employing more workers than it needed or could afford, but it could ill afford to lay off workers because, under the union contract's priority system, it would have had to lay off its most junior workers. Unlike the ordinary situation, where one could expect the most senior workers—those with the greatest experience—to be the most productive, Royal was in exactly the opposite position. Its senior personnel were *least* proficient on the computer machinery that has taken over the industry, and to compete Royal needed to retain employees who lacked seniority but were most efficient on the latest equipment. *See id.* at 417.

Thus, as the bankruptcy court held, "[I]n concept, the changes [in priority] are not inherently unreasonable." The union strenuously argues that concluding that priority

changes are "not inherently unreasonable" is insufficient to justify the proposal, because it is far short of "necessary". This may well be true, but we view the bankruptcy court's statement as a natural response to the union's position that any changes at all in priority were unacceptable. Thus, the bankruptcy court *began* with the conclusion that priority was not off-limits, because changes in priority "are not inherently unreasonable."

But the bankruptcy court did not stop there. It went on to explain the need to eliminate, rather than merely modify, priority, in terms of Royal's need for flexibility in assignments and lay-offs. Judge Abram wrote, "The Debtor will in the future be faced with enormous competitive pressure which will require it to have maximum flexibility, including with respect to utilization of its unionized labor, in order to mold and adapt in a changing business environment." *Id.* at 416-17.

The union urges that Royal showed only a need for a short-term intrusion into priority, and to depart only on its current lay-offs to result in a work force that would achieve the savings Royal said it expected from completely eliminating priority.

There are two flaws in this argument. First, it ignores Royal's need for long-term flexibility in order to have a truly successful reorganization, one that results in a healthy company emerging from the process. A debtor's proposal need not be limited to the bare bones relief that will keep it going. *See Carey Transportation*, 816 F.2d at 89 ("[I]t becomes impossible to weigh necessity as to reorganization without looking into the debtor's ultimate future and estimating what the debtor needs to attain financial health."); *Royal Composing Room*, 62 B.R. at 418 ("A debtor can live on water alone for a short time but

over the long haul it needs food to sustain itself and retain its vigor.").

Second, it is to be expected that Royal would demonstrate the difficulties with priority by showing its current need to depart from priority. This does not mean, however, that the showing supports only the necessity of the currently proposed lay-offs. As Judge Abram noted, "Projections are necessarily speculations about the future and are an art, rather than a science." *Id.* at 407. We will not hold Royal to show the necessity of every conceivable future use of the flexibility it now requires; it is enough that the bankruptcy court found it needs that flexibility. In an industry where rapid change has been the rule, and where the current need for intrusion into priority is well-established, the implicit finding of a general need to escape from the priority provision to help assure the future health of the company is not clearly erroneous.

CONCLUSION

In short, Royal has shown a need for the level of savings it sought to achieve in its pre-rejection proposal. At least where the union has refused to bargain over particular elements of the proposal, it cannot attack any specific element in seeking to show the proposal is not "necessary". Here, in any event, the need for eliminating priority adequately was established and the bankruptcy court's factual findings support the conclusion that the proposal was limited to "necessary modifications", thus justifying rejection of Royal's contract with Local 607. We can only hope that the parties will now sit down and negotiate in good faith to reach a new agreement to replace the rejected contract, and reconcile the needs of company and workers

alike in an industry where both sides are faced with dramatic, and often painful, changes.

The judgment of the district court is affirmed.

FEINBERG, *Chief Judge* (dissenting):

This appeal raises the question of whether a statute designed to make it more difficult for employers in bankruptcy proceedings to reject labor contracts can be used in a way that Congress obviously sought to avoid. I dissent from the majority opinion principally because it misinterprets the applicable section of the Bankruptcy Code, and thereby unjustifiably allows an employer to use bankruptcy as a way of getting rid of a union contract.

As the majority notes, this case involves the proper interpretation of section 1113(b)(1)(A) of the Bankruptcy Code, which forbids rejection of a labor contract unless management (I use this as shorthand for the debtor-in-possession or the bankruptcy trustee) first makes "a proposal to the [union] . . . which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor." Section 1113 is reproduced in the margin for convenient reference.[1] Because the majority agrees that interpreting 11 U.S.C. § 1113 is at the heart of this case, it is remarkable that the majority almost completely ignores

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1 Section 1113 of the Bankruptcy Code reads as follows:

§ 1113. Rejection of collective bargaining agreements

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

the legislative history of that section. That history reinforces what is implied by the statutory language itself:

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section 'trustee' shall include a debtor in possession), shall—

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

Congress intended section 1113 to make rejection of signed labor contracts difficult (but not impossible) and was especially concerned that bankruptcy not become a union-busting tool. Understanding the genesis of the statute so influences a proper reading of it that I think it worthwhile to set out the legislative history at length.

I. Legislative History of Section 1113

In 1975, this court resolved the "tension between the Bankruptcy Act's policy in favor of giving the debtor a new start and the Labor Act's policy of encouraging en-

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(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

forcement of collective bargaining agreements," by allowing labor contracts to be rejected only if "it clearly appears to be the lesser of two evils and that, unless the agreement is rejected, [the debtor] will collapse and the employees will no longer have their jobs." Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, Inc., 523 F.2d 164, 167, 172 (2d Cir.), cert. denied, 423 U.S. 1017 (1975). However, in 1984 the Supreme Court stated that *REA* made rejection of labor contracts too difficult, and instead adopted a balancing of the equities test, which allowed rejection if "the collective-bargaining agreement burdens the estate . . . [and] the equities balance in favor of rejecting the labor contract." NLRB v. Bildisco & Bildisco, 465 U.S. 513, 526 (1984). This test was widely viewed as so undemanding that it would "almost always lead to approval of a repudiation" because "it is a rare case in which . . . relieving the employer of [the] burden [of the contract] will not . . . aid the 'success of the reorganization.' " 130 Cong. Rec. S6184 (daily ed. May 22, 1984; statement of Sen. Packwood). The Court also held that management can reject the contract unilaterally without waiting for judicial approval.

On the very day the Supreme Court handed down its decision, Representative Rodino, chair of the House Judiciary Committee (which has jurisdiction over bankruptcy), introduced a bill (H.R. 4908) to overturn both aspects of *Bildisco* and to "require the bankruptcy judge to apply the standard used in the second circuit REA Express opinion." 130 Cong. Rec. 2989 (Feb. 22, 1984). As incorporated into the House's general bankruptcy reform bill (H.R. 5174), the bill permitted rejection only after a judicial hearing and even then only if the reorganization would otherwise fail and if the debtor had first proposed modifications to the agreement "necessary . . . for successful

financial reorganization." Id. at H1842 (daily ed. March 21, 1984). Opponents of the bill objected that the proposed standard for rejection of labor contracts was too high to allow needed reorganizations, but the bill passed the House on March 21, 1984. Id. at H1854 (daily ed. March 21, 1984).

In the senate, Senator Thurmond, chair of the Senate Judiciary Committee, introduced a bill that preserved *Bildisco*'s balance of the equities test but prohibited rejection of a contract until at least 30 days after a motion to do so. The bill was "reluctantly" accepted by the business community but rejected by labor. 130 Cong. Rec. at S6084 (daily ed. May 21, 1984). The next day, Senator Packwood offered as an amendment a substitute bill developed with the cooperation of labor leaders. The Packwood amendment required court approval before rejection and established a threshold requirement similar to what is now law—in order to ask a court to balance the equities, management must first make "a proposal . . . providing for the minimum modifications in such employees benefits . . . that would permit the reorganization." Id. at S6181 (daily ed. May 22, 1984). In other words, management had to limit itself by asking for only necessary changes in the labor contract and by not asking for changes that it thought desirable, but not, strictly speaking, necessary. Opponents criticized the Packwood amendment as "too stringent," Id. at S6191 (daily ed. May 22, 1984; statement of Sen. Hatch), and as making "it extremely difficult, if not impossible, for companies . . . to obtain relief under Chapter 11." Id. at S6194 (daily ed. May 22, 1984; statement of Sen. Thurmond). Apparently fearing defeat in the Senate and persuaded that the House would approve the Packwood amendment, Id. at S6189 (daily ed. May 22, 1984), the opponents of the Packwood amendment suc-

ceeded in avoiding a vote on either proposal and in having the Senate go into the conference committee without a labor provision at all.

In the conference committee, the Senate conferees apparently offered to drop a provision to create 85 new judgeships that could be filled before the Presidential election that fall if the House dropped Rodino's provision and let *Bildisco* survive. Id. at S8888 (daily ed. June 29, 1984; statement of Sen. Thurmond), reprinted in 1984 U.S. Code Cong. & Ad. News 576, 582. The House refused. In the compromise that resulted, the conference committee modified the judicial authorization slightly and reported out, see H.R. Conf. Rep. No. 882, 98th Cong., 2d Sess. 61-62 (1984), the current version of section 1113, which takes most of its provisions from the Rodino and Packwood bills but contains a provision for interim relief pending a ruling on a rejection application, see § 1113(e), that is inspired by the Thurmond bill.

The law enacted was thus not a complete victory for either side, In Re Century Brass Products, Inc., 795 F.2d 265, 276 (2d Cir. 1986): an employer (again, I use this as shorthand for the debtor-in-possession or trustee) might obtain interim relief from the bankruptcy court even though the labor contract was not yet rejected, but the weak *Bildisco* standard for rejection was "modified," see *Century Brass Products*, 795 F.2d at 272, and strengthened in a number of ways. Most notable in this context is that in order to be able to reject a contract in a bankruptcy proceeding management before applying for rejection must "make a proposal . . . which provides for those *necessary* modifications in the employees benefits and protections that are *necessary* to permit the reorganization of the debtor." § 1113(b)(1)(A) (emphasis supplied).

Thus, section 1113 in its final form is a pro-labor law. As its strongest opponent, Senator Thurmond, said in introducing the conference bill to the Senate, "were it not for the critical need to pass this bankruptcy bill [the Bankruptcy Amendments and Federal Judgeship Act of 1984, which reorganized the bankruptcy courts after the Supreme Court had ruled them unconstitutional], I could not have agreed to" section 1113, since its "procedures and standard are essentially the same as those of the Packwood amendment." Id. at S8888 (daily ed. June 29, 1984), reprinted in 1984 U.S. Code Cong. & Ad. News 576, 582. As Senator Packwood explained, "the debtor will not be able to exploit the bankruptcy procedure to rid itself of unwanted features of the labor agreement that have no relation to its financial condition . . . . The word 'necessary' inserted twice into this provision clearly emphasizes this required aspect of the proposal which the debtor must offer." Id. at S8898 (daily ed. June 29, 1984).

I have set out the legislative history at length because I believe it shows that a political battle was fought over section 1113, and that, as far as is relevant to management's proposal here, those who wished to make rejecting a labor contract more difficult were successful. It is against this background that the bankruptcy court's decision in this case should be judged.

II. Discussion

As I understand it, in affirming that opinion the majority adopts alternative holdings. On the one hand, it says that "where a union refuses to negotiate in order to obtain a different combination of modifications [in a proposal], it may not challenge the particular combination, or any vital element, contained in the debtor's proposal. So long as

the total quantum of savings is necessary . . . the union may not prevent rejection." (p. 11). This rule—which lowers the standard of necessity to punish the union for ignoring a gratuitously harmful modification—is essentially the same as the bankruptcy court's holding that because the union stonewalled after receiving the employer's proposal, the court would "focus on the larger picture: whether the Debtor has shown any necessity for modifications of the magnitude it proposed." In re Royal Composing Room, 62 Bankr. 403, 411 (Bankr. S.D.N.Y. 1986). Alternatively, the majority says that "[e]ven if we were to view the proper focus to be on the single element of eliminating priority, we would conclude that Royal demonstrated that it was a 'necessary modification.' " (p. 12). Each holding will be considered in turn.

A. *Negotiations and the Easier Standard for Necessity*

It must be remembered that Section 1113 requires an employer to include only necessary modifications in its proposal. (Hereafter, I use "proposal" in the technical sense to refer to a proposal made by management to satisfy section 1113(b)(1)). The majority's first alternative holding purports to shift the analysis from the individual contractual modifications that constitute the employer's proposal to the proposal as a whole. However, the total savings generated by a proposal composed of several items cannot be determined without knowing the savings generated by each item. Moreover, in applying its rule, the majority considers only the savings to management from the proposal and ignores the harm to the union. This combined approach overlooks the fact that a particular proposed contract change may harm the union greatly and help the employer economically little, if at all. In addition, the majority's rule incorrectly looks to the Union's negoti-

ating record to determine which definition of necessity to use.

The bankruptcy court acknowledged that it was departing from the statutory standard in considering the union's negotiating posture and in not weighing the employer's proposal on its own merits. It stated that "Although Code § 1113(c)(1) starts with the debtor's proposal, this court declines to make the debtor's proposal itself the first and foremost topic of consideration as placing such primacy on the proposal inhibits, rather than fosters, . . . prehearing negotiations." 62 Bankr. at 406-07. This was contrary to *Century Brass*, 795 F.2d at 273, which tracked the statutory language in setting out the order of the three-part rejection test.

The statute gives no indication that the union's negotiating position should govern the definition, or application, of the standard of necessity. Moreover, although section 1113 does require bargaining between employees and financially unsuccessful management,[2] it does not absolutely obligate a union to negotiate regardless of the terms of management's proposal. To the contrary, the point of the requirement that the proposal contain only "necessary" modifications is to limit when a union can be re-

2 I believe that Congress intended at least some bargaining to occur between the time management makes a proposal and the time it applies to reject the contract. Management should therefore make its proposal sufficiently in advance of its application to allow negotiations. Cf. Wheeling-Pittsburgh Steel Co. v. United Steelworkers of America, 791 F.2d 1074, 1077, 1093 (3d Cir. 1986) (three weeks between proposal and application). In this case, Royal seems to have prepared its application before making its proposal on March 18 and filed the application the next day. This behavior, while not necessarily proof of bad faith, prevented meaningful negotiations after bankruptcy had become a reality but before management's inflammatory attempt to abrogate the contract completely. Such behavior should be discouraged.

quired to reopen and renegotiate an already signed contract.

In contrast, the majority requires unions to negotiate over terms that save nothing—which by no stretch of the imagination can be called "necessary"—even though those terms mortally wound the union, because refusal to negotiate over a specific term bars the union from objecting to that term at the subsequent rejection hearing.[3] Consider the following hypothetical: a bankrupt company that needs to save $200,000 per year to reorganize successfully proposes the following as "necessary" modifications to its union contract: (1) reduce the wages of each of its 100 union employees by $2,000 per year; (2) eliminate the contract's "last-hired, first-fired" provision; and (3) eliminate a union-dues check-off provision that requires management to deduct union dues from employees' paychecks but does not require management to contribute any funds to the union. Assume that provisions two and three save no money, and the union refuses to negotiate until they are removed from the bargaining table. Under the majority's first alternative approach, the contract could be rejected, since the total savings ($200,000) is necessary and since the union's refusal to negotiate bars it from contesting the details of the plan. The majority's approach is almost as absurd when a management proposal would save little money relative to the amount needed to be saved and the damage to the union is great, as is the case if, for example, eliminating the dues check-off provision might

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3 The majority says that the union is barred from challenging "vital" elements of the proposal. However, the majority never defines "vital," which is not a statutory term. If "vital" means "necessary," then the word adds nothing. If it means something other than necessary, then adding the term creates another layer of confusion and opportunity for litigation.

save management only a few dollars in accounting costs, but would substantially harm the union.

The majority thus allows individual anti-union modifications that save management little to lurk in court-approved proposals. The majority thereby disrupts the scheme of section 1113, since it effectively eliminates the word "necessary" from subsection (b)(1)(A) and leaves only the good faith and balance of the equities clauses to protect the union. This was not the result Congress intended when it overruled *Bildisco*, which said that only balancing the equities was required. The majority's rule also violates Truck Drivers Local 807 v. Carey Transportation, Inc., 816 F.2d 82 (2d Cir. 1987), in which we held that a management proposal must be limited to "necessary, but not absolutely minimal" modifications, since under the majority's rule, even modifications that do not significantly help the reorganization are permitted. The majority suggests that the union could avoid an outrageous modification even if it refuses to negotiate by proving that it was made "in bad faith, in an effort to stalemate negotiations." However, this suggestion puts the cart before the horse by ignoring the statutory requirement that a necessary proposal (subsection (b)(1)) precede the good-faith negotiations required by subsection (b)(2). Moreover, management may make a good-faith mistake in thinking its proposal is necessary. The good-faith provisions therefore do not substitute for the necessity requirement.

If later cases nonetheless follow the majority's first alternative holding instead of its second, I would hope that they would make the best of a bad rule and interpret "negotiation" broadly. It should be enough for a union to (1) state the modifications to which it objects, and (2) give a

short explanation of its objection. For example, the union might say "We object to elimination of dues check-off because it will hurt our independence and financial security, and management hasn't shown that it will save significant amounts of money." Once the union has begun negotiations, the usual *Carey Transportation* standard for "necessary"—and not the majority's alternative—would apply.

B. *Necessity*

Based on the record before us, I also disagree with the majority's second alternative holding that "Even if we were to view the proper focus to be on the single element of eliminating priority, we would conclude that Royal demonstrated that it was a 'necessary modification' as . . . defined in *Carey Transportation*."[4] (p. 12). Priority is so important to the union that making its elimination "necessary" requires a stronger showing than has been made here.

Priority—called seniority in most businesses—has become one of the cornerstones of American unionism. Seniority is the most important, and often the only, equity workers have in their company. It is one of the chief protections a worker has from management's vagaries, and it preserves the self-esteem and financial security of workers who have devoted their lives to building a company. As the Supreme Court has said, " 'More than any other provision of the collective[-bargaining] agreement . . . seniority affects the economic security of the individual

4 As discussed in Part III, I would not reach these issues because the record is unclear about whether the proposal asked for the total elimination of priority. Nonetheless, in order to register my disagreement with the majority on these matters, I will assume (as it does) that the proposal sought the total elimination of priority.

employee covered by its terms.' " Franks v. Bowman Transportation Co., 424 U.S. 747, 766 (1976). Priority is so important that the union president in this case said he was willing to "take whatever wage cut is necessary to keep this firm in business, but I don't think that we should be asked to give up priority for that purpose."

Given the generally recognized importance of seniority to unions, the union's refusal to negotiate as long as management sought to eliminate priority was understandable, even if unwise. More importantly, on the record in this case, the bankruptcy court could not have found that totally eliminating priority would have generated so much savings relative to the harm to the union—in the context of the savings necessary and the alternatives available—that the proposal could fairly be called "necessary."

The evidence was sufficient to support a finding that a limited intrusion into priority was necessary, but there was no specific, factual information proving that priority had to be totally and permanently eliminated. The bankruptcy court, quoted with approval by the majority (p. 14), excuses this failure with generalities like "A debtor can live on water alone for a short time but over the long haul it needs food to sustain itself and retain its vigor," 62 Bankr. at 418, and "Projections are necessarily speculations about the future and are an art," 62 Bankr. at 407, but truisms do not substitute for evidence. Although I agree with the majority that we should "not hold Royal to show the necessity of every conceivable future use of the flexibility" created by eliminating priority, I disagree that "it is enough that the bankruptcy court found it needs that flexibility." (p. 15). To be upheld on appeal, the bankruptcy court's finding must be based on evidence.

Moreover, the bankruptcy court did not find that totally eliminating priority was *necessary*. The majority admits that the court did not make its findings explicit, but says that "such a finding is implicit." (p. 12). I disagree. The bankruptcy court stated that "The Union has questioned the need for *any* alteration of existing priority . . . rules. The court is persuaded that . . . *some* intrusion on the priority system was not inherently unreasonable" since "[t]he Debtor will in the future be faced with enormous competitive pressure which will require it to have maximum flexibility, including with respect to utilization of its unionized labor, in order to mold and adapt in a changing business environment." 62 Bankr. at 417, 416-17 (emphasis added).

The first finding—that "*some* intrusion on the priority system was *not inherently unreasonable*"—does not even approach a finding that *total* elimination of priority is *necessary*. The second statement—about the "enormous competitive pressure" requiring "maximum flexibility"—is so general as to be meaningless. It could be said of any bankrupt company, since presumably a company would not be bankrupt without "enormous competitive pressure" and since management always wants to have "maximum flexibility." Indeed, one of a union's key functions is to decrease management's flexibility by giving workers a role in their own work, and increasing flexibility is often code for ending unionization. Similarly, under the bankruptcy court's reasoning, almost any bankrupt company could eliminate seniority without proving any particularized need. Congress did not intend Section 1113 to be management's tool for eliminating seniority provisions. Instead, Congress required the employer to prove specific facts showing that the specific relief requested is necessary in its particular circumstances. On this record, the employer

never met its burden, the bankruptcy court applied the wrong standard and, in any event, did not make particularized findings. At the very least, I would remand for further factual findings.

III. Remand for Factual Clarification

Other aspects of the proceedings below also suggest that, in any event, a remand would have been appropriate and that this is the wrong occasion on which to announce a new interpretation of the necessary-proposal requirement.

A. *Uncertainty About Proposal's Content*

The majority opinion seems to be premised on the assumption—shared by Royal and the union—that the proposal at issue here is the single set of modifications Royal asked for orally on March 18.[5] This premise was not shared by the bankruptcy court, which seems to have considered a variety of suggested modifications under the ru-

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5 Royal's application for rejection was evidently prepared before the March 18 discussion with the union, since the application states "A meeting has been scheduled for Tuesday morning, March 18." Daniel Haberman, chairman of Royal's board, testified about the March 18 meeting as follows:

> The union's lawyer asked for our proposal, and what happened was, the two-part answer is, one, we gave them—Mr. Rosen [Royal's lawyer] said that our March 3rd written proposal . . . that our March 3rd written proposal as amplified by what we told them verbally at the March 18th meeting—in other words, most of this is in the March 3rd written proposal—excuse me—in the March 3rd written request that we gave to the union on the afternoon of March 3rd. In addition to that the other items we told the union verbally in the March 18th meeting. The problem that we had there was—the problem that I have, that afternoon we were going to a conference with Judge Abram on the interim relief and, so, the proposal was a combination—most of it was in writing, that is, and was accepted
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> . . . .

bric "proposal," but did not isolate any single proposal to determine its necessity. 62 Bankr. at 410 n.15 ("Analysis of the differences [between the various proposals] is not material to the motion.") This was error, because the statute envisions that the bankruptcy court scrutinize a single proposal. Because the bankruptcy court did not have a particular proposal in mind, it could not have determined the necessity of a particular proposal, and because I do not believe that we should evaluate a proposal without the benefit of the bankruptcy court's assessment of it, I would at the very least remand for consideration of a single proposal. However, even if I were inclined to review the March 18 proposal in the first instance, I could not do so because the exact content of that proposal is not in the record.

As the majority states, both sides have focused on the modification relating to priority. However, because there was no contemporaneous, written record of the March 18 proposal and because the bankruptcy court did not make clear findings about that proposal's content, see 62 Bankr. at 410 n.16, it is not clear from the record whether the March 18 proposal sought to eliminate priority, totally or partially. The March 3 written request for changes did not mention priority at all, see 62 Bankr. at 408-09 n.9, and when the bankruptcy judge asked "Is the proposal that the debtor eliminate seniority issues altogether or that the debtor obtain a one-time . . . window," the debtor's chief negotiator answered "it's somewhere in the middle . . . . I anticipate that there will be a one-time problem of excessing 5 or 6 people . . . [but] I will then reserve the right to again go by way of merit selection rather than seniority. . . . At no time has the debtor ever asked for what you describe as a cart[e] blanche right to elimi[na]te seniority. . . . Most of the aspects that seniority has we're

not asking for change." Cf. 62 Bankr. at 413 (management request in January to eliminate five employees, not all of seniority). If the proposal had clearly asked for a small, temporary incursion into priority, I might feel differently about the necessity of the modification, as indicated above. However, on the record before us I cannot tell what the proposal was and therefore cannot judge whether it was necessary.

Analyzing the proposal as a whole, which the majority does, is similarly impossible because one cannot determine the proposal's total savings without knowing what the specific modifications are and how much each will save. Because this factual issue is at the heart of the appeal and because it is a basic principle of federal jurisprudence that courts pass on legal questions only in concrete factual situations, I would not use this case to announce a new interpretation of the necessary proposal requirement. Instead, I would remand for factual findings with a suggestion that bankruptcy courts in the future not consider rejection applications unless accompanied by a copy of the clear, written, dated proposal by management to a union.

B. *Timing of Proposal*

There is another assumption shared by the parties and the majority but not by the bankruptcy court. The former apparently assume, and I tentatively am inclined to agree, that the proper proposal to evaluate is one made "[s]ubsequent to filing a petition and *prior to filing an application*," § 1113(b)(1) (emphasis added), which in this case is between March 14 and March 19. However, the bankruptcy court said it would consider the proposal "to the extent the proposal was made *prior to the commencement of the rejection hearing*," 62 Bankr. at 407 (emphasis added), which was May 8. In so holding, the court relied

on section 1113(c), which says that "[t]he court shall approve an application for rejection . . . only if the court finds that—(1) the trustee has, prior to the *hearing*, made a proposal that fulfills the requirements of subsection (b)(1)." (emphasis added). Under this reading of the statute, management can continue making proposals all the way to the rejection hearing, and only the last one is subject to the necessity test. The question is important because before we can evaluate the necessity of a proposal we must know its terms. Since the issue was neither briefed by the parties nor ruled on by the majority, I do not express a firm view. I note the issue for the future and to point out the fundamental confusion in the record, confusion that should have precluded the majority from even considering whether the total elimination of priority was necessary.

For the reasons stated above, I dissent from the majority's unnecessarily broad decision that conflicts with the intent of Congress as expressed in Section 1113. I would either reverse or, at the least, remand for clarification.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN re ROYAL COMPOSING ROOM, INC.,	:	86 Civ 4849 (JFK)
Debtor.	:	OPINION and ORDER

APPEARANCES:

For Appellant New York Typographical Union No. 6:
Vladeck, Waldman, Elias & Engelhard, P.C.
New York, New York
Of Counsel: David Silberman
AFL-CIO
Washington, D.C.

For Appellee:
Michael Hess
Gelberg & Abrams
New York, New York

JOHN F. KEENAN, United States District Judge

JOHN F. KEENAN, United States District Judge

Background

New York Typographical Union No. 6 ("Local 6") appeals from an order of the Bankruptcy Court filed by Bankruptcy Judge Prudence B. Abram. Judge Abram granted the motion of the Debtor, Royal Composing Room, Inc., ("Royal") for approval of its rejection of its collective bargaining agreement with appellant. For the reasons set forth below, the Court affirms Judge Abram's order.

Facts

This case arises in a changing industry. The appellee is an advertising typography company, and one of the last unionized shops. For most of this century, the advertising typography industry relied extensively on the linotype machine.

However, the past decade has seen the industry turn increasingly to the latest computer technology.

It was in this corporate environment that Royal was created in 1975 as a result of the merger of two old unionized typesetting companies. Royal was a party to a collective bargaining agreement with Local 6. Although the company was profitable during its first several years, in 1982 its financial condition worsened. In that year, the annual gross revenues decreased by two million dollars, and it suffered a net loss of $545,236. Over the following three years, Royal lost over $752,900.

When confronted with these difficulties, Royal began to cut expenses. In 1983, Royal sharply cut the compensation of its principal executives, it froze salaries of salesmen and middle management foremen, and it eliminated company

automobiles, along with other savings efforts. In 1985, Royal moved its plant to a smaller location to avoid a rent increase. By the end of that year, Royal reduced the number of non-Local 6 employees from 48 to 40.

As of the end of 1985, Local 6 had not yet made any sacrifices or concessions. It became increasingly urgent to obtain some savings from the union when Royal lost its largest customer, Doyle Dane Bernbach Inc., at the start of 1986. Royal was unable to convince the union to forego a 3% wage increase that had already been agreed to, nor would the union alter its arbitration demands.

On March 14, 1986, Royal filed its petition for reorganization under Chapter 11, section 301 of the Bankruptcy Code. Royal then sought to reject its collective bargaining agreement under section 1113(a). However, pursuant to section 1113(b)(1)(A),

before rejecting the agreement, Royal was required to make a proposal to the union, "which provides for those necessary modifications in the employees' benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of affected parties are treated fairly and equitably." On March 18, a meeting was held between Royal and Local 6 at which the proposal was made. The proposal included a reduction of benefits, changes in work rules, the elimination of the scheduled wage increase, and the elimination of the union's right to arbitration as the way to change the contract. The union rejected the proposal and did not negotiate. Judge Abram noted that, "[t]he small number and short length of the meetings had is attributable to the union . . . . At no time prior to May 5, 1986 did the union make a counterproposal, comment item by

item on the Debtor's proposal or the Debtor's financial situation, or state any reasons why it found the Debtor's request to be unfair or inequitable." In re Royal Composing Room, Inc., 62 B.R. 403, 409 (Bankr. S.D.N.Y. 1986). On May 5, 1986 the Bankruptcy Court held a final pretrial conference and, for the first time, the union made a counterproposal. Judge Abram found the proposal unacceptable. See id. at 410. On May 8, the trial commenced and on June 16, Royal's section 1113 motion was granted. This appeal followed.

DISCUSSION

Focusing on section 1113(c)(1), Local 6 raises two arguments on appeal: (1) the Bankruptcy Court did not apply the proper definition of "necessary" under section 1113, and (2) Royal's proposal did not treat all affected parties fairly and equitably. Both positions are unavailing.

At the outset, it should be noted that a bankruptcy court's interpretation of the statute is a legal conclusion subject to plenary review. Truck Drivers Local 807 v. Carey Transportation Inc., 816 F.2d 82, 88 (2d Cir. 1987). If the bankruptcy court's legal interpretations are correct, then its factual determinations can only be disturbed if they are clearly erroneous. Id. In this case, Judge Abram's opinion passes muster.

The Second Circuit has indicated that the term "necessary" contained in section 1113(b)(L)(A) does not mean "'essential' or bare minimum" See Carey Transportation, 816 F.2d at 89. In rejecting the Third Circuit's approach which equated necessary with essential, see Wheeling-Pittsburgh Steel Corp. v. United Steelworkers, 791 F.2d 1074, 1088 (3d Cir. 1986), the Second Circuit ruled that, "the necessity requirement places on the debtor

the burden of proving that its proposal is made in good faith, and that it contains necessary, but not absolutely minimal, changes that will enable the debtor to complete the reorganization process successfully." In substance, this is the analysis employed by Judge Abram. Indeed, the Second Circuit in Carey Transportation quoted with approval Judge Abram's description of why a broader definition of "necessary" was required. "As the Royal Composing Room court phrased it, 'A debtor can live on water alone for a short time but over the long haul it needs food to sustain itself and retain its vigor.'" Carey Transportation, 816 F.2d at 89-90 (quoting 62 B.R. at 418).

Applying the standard of necessity later endorsed by the Second Circuit in Carey Transportation, Judge Abram found that Royal had, "established that it had in good faith attempted to negotiate for

necessary changes but had been unsuccessful because of the Union's unwillingness to engage in serious discussions." 62 B.R. at 618. The record supports this finding. Local 6 was unresponsive and dilatory in the face of management's financial condition and resulting proposal. Likewise, Judge Abram was correct in her analysis of Royal's proposal. She found that Royal had cut non-union management and executive salaries, eliminated trade association memberships and even reused old doorknobs. 62 B.R. at 412. During this time, union labor costs were the only expenses not cut. Id. It cannot be concluded that these findings were clearly erroneous. The correctness of Judge Abram's legal conclusion is bolstered by the Second Circuit's statement in Carey Transportation that courts "must consider whether rejection [of a collective bargaining agreement] would increase the

likelihood of successful reorganization." Carey Transportation, 816 F.2d at 89. This Court cannot envision Royal being able to successfully reorganize absent at least enforcement of its proposal under section 1113(b)(1)(A). Rejection clearly increases the likelihood of successful reorganization.

Local 6 further asserts that Royal did not satisfy the statutory requirement that under the pre-petition proposal, "all creditors, the debtor and all affected parties are treated fairly and equitably." Judge Abram correctly found that Royal "had spread the burden of financial sacrifice." 62 B.R. at 411. As noted earlier, Royal cut costs in many ways, including a decrease in executive compensation, the rescinding of raises and freezing of salaries of salesmen and middle level management, the elimination of company cars, and the moving of its premises to

smaller quarters. The union's wages were neither frozen nor cut. It is clear that the pre-petition proposal merely sought "to spread the burden of financial sacrifice" a little further, so that it reached the union. Carey Transportation again underscores the wisdom of Judge Abram's opinion. The Second Circuit observed that a debtor need not show that managers and non-union employees have their benefits cut to the degree union benefits are cut. 816 F.2d at 90. In this case, the union's benefits were the last to be cut, and it certainly was not the only constituency in Royal to feel the financial pinch. Royal's proposal satisfied the statute's requirement of fairness and equity.

CONCLUSION

The Bankruptcy Court properly found the pre-petition proposal satisfied the

requirements section 1113(b)(1)(A), and that the rejection of the collective bargaining agreement was proper. The opinion of Judge Abram is hereby affirmed.

SO ORDERED.

Dated: New York, New York]
September 29, 1987

John F. Keenan /s/
JOHN F. KEENAN
U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN re ROYAL COMPOSING ROOM, INC.,	:	No. 86 B 10435 (PBA)
Debtor.	:	

APPEARANCES:

GELBERG & ABRAMS
Attorneys for Debtor
711 Third Avenue
New York, New York 10017
By: Michael D. Hess, Esq., and
Stanley Bernstein, Esq., of Counsel

MILGRIM THOMAJAN JACOBS & LEE
Attorneys for Debtor
405 Lexington Avenue
New York, New York 10174

VLADECK, WALDMAN, ELIAS & ENGELHARD, P.C.
1501 Broadway
New York, New York 10036
By: Andrew S. Hoffman, Esq., of Counsel

DECISION ON DEBTOR'S MOTION FOR APPROVAL OF REJECTION OF COLLECTIVE BARGAINING AGREEMENT

ABRAM, Prudence B., U.S.B.J.:

A struggle for survival by apparently endangered species is at the

core of the disputes raised by this motion by a debtor to reject a collective bargaining agreement. The debtor, Royal Composing Room, Inc. ("Royal"), is one of the last unionized advertising typography shops in New York City. The union, New York Typographical Union No. 6 ("Union"), has seen its membership decline rapidly since 1975, when virtually all advertising typography shops were uinionized. The Union's 1975 multi-employer contract with the Printers League, which includes financial printers in addition to typographers, will expire in September 1989 and prospects for renewal are uncertain. Advertising typography itself is in the midst of radical change. Dramatic technological changes since 1976 have converted an industry that for the previous sixty years had relied on the linotype machine to one that relies today on the latest computer technology. The print

advertising industry itself began to change in the 1950's with the advent of television. Advertising agencies, the prime customers of advertising typographers, are no merging to form mega-agencies and acquiring the equipment to perform typography work themselves.

The Debtor's chapter 11 petition was filed on March 14, 1986 The seven days of trial on the Debtor's rejection motion which was filed on March 19, began on May 8 and concluded May 28. Coincidentally, the Third Circuit issued its decision on the appeal from an order permitting rejection of a collective bargaining agreement in the Wheeling-Pittsburg Steel Corporation Chapter 11 case on May 28.

Both sides have appealed to this court's sense of equity, one seeking to have the application denied, the other seeking to have it granted. Several centuries ago, John Selden wrote:

> "Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a 'foot', a Chancellor's foot; what an uncertain measure this would be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the Chancellor's conscience."

For the reasons which follow, the court has determined that it should grant the Debtor's application for rejection of its collective bargaining agreement. This court is powerless to impose contractual modifications on the parties, even if that were the equitable outcome. It can only permit rejection or not. After rejection, a debtor must still bargain with the union. If the changes this Debtor imposes after rejection are unacceptable, the employees are free to resign or strike.

The tragedy of this case is that despite the high stakes the Debtor and the

Union have been unable to negotiate a solution either before the trial started or thereafter. The Debtor made it clear that it would close its doors if rejection were not permitted because of its inability to obtain necessary modifications from the Union. The Union made it clear that the workers would in all likelihood strike if rejection were permitted, which strike alone could force the Debtor to close permanently. In either case, the jobs of the present 31 Union workers and 40 non-union workers would be lost, with resulting hardships on themselves and their families[1] and possible losses to creditors, and the shareholders will lose a business to which they have devoted the whole of their working lives. Reasonable people faced with these stakes should have been able to effect a workable compromise.

Code (1113 provides no mechanism for the court to appoint anyone to assist the

parties in their negotiations or to mediate their disputes. Until Congress provides for the appointment of a mediator in the event of a motion for rejection in a Chapter 11, the negotiations remain in the hands of the debtor and the union.[2]

The legislative history of code (1113 contains repeated references to the necessity for negotiations between the debtor and the union before the court can act to permit rejection.

> "In sum, *** this conference report, consistent with the intent of Congress in the National Labor Relations Act, provides that the company must try to negotiate with employees to work out the changes necessary to prevent the company from failing. The legislation also reimbodies the principal of the NLRA by requiring the company to bargain in good faith." Statement of Senator Moynihan at XX-91.[3]

> "After the proposal is made, and until a hearing on the motion to reject, the parties must bargain in good faith. This provision places the primary focus on the private collective-bargaining process

and not in the courts. *** The amendments also prohibit the trustee from unilaterally altering or terminating the labor agreement prior to compliance with the provisions of the Section. This provision encourages the collective bargaining process, so basic to federal labor policy." Senator Packwood at XX-83-XX-84.

"The phrase 'without good cause' in subsection (c)(2) of new Section 1113 *** is intended to ensure that a continuing process of good faith negotiations will take place before court involvement ***. In deference to the overall policy of the provision which is to encourage the parties to reach their own agreement through collective bargaining, the court in framing any such relief may not go beyond the proposal made by the trustee pursuant to subsection (b)(1)(A)." Representative Morrison at XX-33-XX-34.

"This provision will require negotiations to attempt to save both the labor contract and the business prior to court adjudication to reject the contract. *** The business must make an offer to its employees' union representatives [that strive to both preserve the collective bargaining agreement and permit a successful reorganization.]

> That offer should make 'those necessary modifications' in the contract as 'are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all the affected parties are treated fairly and equitably.' The intent of this provision is to allow the business to make whatever changes in the collective bargaining agreement are reasonably necessary to ensure the likelihood of a successful reorganization. The provision emphasizes that the inevitable balancing that will go into this attempt to save both the business and the labor contract must reasonably assure the fair and equitable treatment of all those affected by the reorganization effort. This fair and equitable treatment language was intended by the conference to ensure that the type of balancing of all the equities that takes place when the court finally rules on rejection also takes place during these preliminary negotiations." Senator Hatch at XX-58 and XX-60-61. (Emphasis added).

This court eschews the talismanic nine-step analysis of Bankruptcy Code (1113 first used in In re American Provision Co., 44 B.R. 907 (Bankr. D. Minn. 1984).

Instead, this court looks to the three interdependent findings required by Code §1113(c).[4] See Gibson, New Law on Rejection of Collective Bargaining Agreements in Chapter 11: An Analysis of 11 U.S.C. §1113, 58 Am. B.L.J. 325, 335 (1984) (hereafter "Gibson"). Compare In re K&B Mounting, Inc., 50 B.R. 460 (Bankr. N.D. Ind. 1985). The court, however, reverses the usual order in which the three are considered. Although code §1113(c)(1) starts with the debtors' proposal, this court declines to make the debtor's proposal itself the first and foremost topic of consideration as placing such primacy on the proposal inhibits, rather than fosters, the prehearing negotiation process envisioned by Congress as the facts of this case make plain. If the first focus is the debtor's proposal, the rejection process becomes a game of Russian roulette in which the union will stand mute

during negotiations in the expectation that the court is apt to find some aspect of the debtor's proposal unnecessary or inequitable.[5] The tactical odds heavily favor the union in that game as few Chapter 11 debtors have the capacity to make a proposal "perfect" without the refining fire of a union's prehearing critique. The necessity for the Debtor's proposal and the equitability of the sacrifice are matters which must be first tested in the crucible of prehearing negotiations. Indeed, the principal purpose of prehearing negotiations is to discuss modifications to the debtor's proposal.

The court is to consider a debtor's proposal only to the extent the proposal was made prior to the commencement of the rejection hearing. Code (1113(c)(1). It is only sensible that the court have a fixed point in time to look to as otherwise the court would be trying to deal with a

constantly moving target as a debtor altered its proposal during the course of the trial. Likewise, a union's prehearing position should be the focus of the trial. For the court to judge a debtor's proposal on grounds articulated by a union for the first time at trial is to permit the union to do that prohibited to the debtor and would defeat Congressional intent that prehearing negotiations be fostered.

A union must articulate and discuss in detail with a debtor during the prehearing negotiations its reasons for declining to accept the debtor's proposal in whole or part. If prehearing, a union has assigned no reason for its refusal to accept a debtor's proposal, it has perforce refused to accept the proposal without good cause under Code (1113(c)(2).

It is impossible to conceive of a case in which some aspect of the debtor's projections as to its future financial

needs, the allocation of burden among the various parties, or some item in the menu of modifications in the union contract proposed by the debtor could not be viewed as unnecessary, inessential or inequitable. Projections are necessarily speculations about the future and are an art, rather than a science. The factors that might influence the equities of the allocation of burden or the necessity for a proposal are numerous.[6] The possible points of dispute on the details of the Debtor's proposal are infinite. Wage cuts can be traded for benefit cuts, as was done by the Debtor here. Holidays and working hours can be traded off.[7] Only the negotiating process can reveal which of a debtor's proposals on the large issues of how much aggregate relief is required and how much should be apportioned to the union, as well as on the smaller issues of how the union contract cuts should be made, are appropriate or

ill-conceived or should be modified and how the difficult problems presented by the economic realities of the Debtor's situation can and should be resolved.

The balance of the equities, see Code (1113(c)(2), clearly favors rejection when it is apparent that a Debtor is in need of substantial relief under a union contract and the bargaining process has failed to produce any results and is unlikely to produce results in the foreseeable future. Bluntly stated, a stonewall by the union favors the grant of the Debtor's motion for rejection. Upon rejection, the negotiation process will be revitalized by the alteration in the positions of the players.

In this case, the court finds the Union's posture was essentially a stonewall. Royal initially sought relief from the Union in May 1985. That request was denied. Thereafter, upon learning that

it would lose a major client in June 1986, Daniel Haberman, the Chairman of the Board of Royal, immediately sought to and did meet on January 17, 1986 with Bertram Powers, President of the union to request "massive" and "immediate" relief under the Union contract. No relief was granted. Shortly afterwards Mr. Haberman flew to Colorado Springs to discuss the situation with the International. Another meeting occurred on February 12, 1986 at which Royal again unsuccessfully requested relief.

The Debtor attempted to deal with the political problems faced by the Union by resigning the following day, February 13, from the Printers' League and withdrawing the authority of the Printers' League to represent Royal in the negotiation or administration of the collective bargaining agreement. The Debtor recognized that resignation did not

relieve it of its obligations under the existing contract. The Debtor was seeking to free the Union to negotiate with the Debtor directly without creating unnecessary problems for the Union with other employers in the multi-employer unit. At the time the Union declined to recognize Royal's resignation, although at trial the Union's attorney conceded that the Debtor was free to resign from the Printers' League.[8]

Royal presented a written proposal for relief at a meeting with the Union on March 3, 1986.[9] Prior to the March 3 meeting, the Union did request relief for Royal from the BAP Fund obligation, and the BAP Fund trustees, of whom Mr. Powers was one, subsequently agreed that it would relieve Royal of about half of its BAP Fund contribution, subject to the BAP Fund accountant inspecting Royal's books and records.[10] At the March 3 meeting, Mr.

Powers suggested that Royal create an employee stock option plan but again declined to consider the Debtor's proposal.

After the Chapter 11 petition was filed on March 14, the Debtor immediately sought to meet with the Union but the Union did not meet with the Debtor until March 18, the same day the Debtor obtained an order to show cause fixing March 21 as the day for a hearing on the interim relief portion of its application to reject the collective bargaining agreement.[11] After the March 21 hearing at which the Union did not oppose the request for interim relief,[12] the Union did not meet with the Debtor again until April 17. There were no meetings after that. None of the meetings lasted more than an hour or two.

The small number and short length of the meetings had is attributable to the Union. The Debtor was continuously available for and sought other meetings.

It is a sad commentary on the prehearing negotiation process in this case for the court to note that the parties spent almost ten times more time in court litigating this matter than in post-petition prehearing negotiations (30 hours compared to about 3.5 hours). At no time prior to May 5, did the Union make a counterproposal, comment item by item on the Debtor's proposal or the Debtor's financial situation, or state any reasons why it found the Debtor's request to be unfair or inequitable.[13]

On May 5, a final pretrial conference was held to discuss the trial scheduled to commence on May 8. During the pretrial conference, the Union through its attorney for the first time made a counterproposal. The counterproposal did not conform to the format of or respond directly to Royal's request. Notwithstanding the lack of comparability,

it is evident that the 's counterproposal[14] provided significantly less economic relief to the Debtor than the interim relief which had been granted on March 21 as it did not relieve the Debtor from 2 of the 4 benefit funds and treated any wage cut as a loan.

At trial, Mr. Powers testified that he viewed the Debtor's proposal[15] as an aggregate and responded to it as an aggregate. Mr. Powers is absolutely opposed to any alteration of the existing priority system established by the Union contract and believes that priority is the rock-bed on which American unionism is founded. Because the Debtor's proposal included requests for modifications of the priority system, Mr. Powers declined to respond to particular items of the Debtor's proposal.[16] When questioned regarding specific aspects of the Debtor's proposal Mr. Powers said that labor negotiating strategy generally does not involve

negotiating individual points separately from the entire package. Mr. Powers followed that general strategy in this case.

The Union's strategy of focusing on the package would be appropriate if the bargaining were over the amount of the relief the Debtor required or the proportion of the total relief needed to be allocated to the Union. Once the parties agree on the total and relative amounts, then the focus of the bargaining can turn to the details of modifications in the union contract necessary to produce that amount. At trial, it was apparent that the Union does not agree on the total magnitude of relief the Debtor needs in order to remain competitive in the industry or on how much of that relief should come from the Union.[17] the Union raised issues at trial respecting whether the sacrifices were being equitably distributed. For

example, at the mid-point of the trial the Union brought out for the first time that Mr. Haberman is on the Debtor's premises only once a month on average.

It is the Union's view that the Debtor escalated its demands after the Chapter 11 filing to include the priority modification requests and refused to withdraw them because the Debtor knew the Union was unequivocably opposed to any change in the priority system. At trial, the Union sought to show that Mr. Haberman was motivated by a desire to create a model union contract.[18] Although Mr. Haberman conceded his interest in a model contract, his main motivation has been the salvage of Royal's future. This court finds that the Debtor did not intentionally sabotage the negotiations by requesting priority changes and that the Debtor sought modifications in good faith which it believed were necessary

and to which it believed the Union might and could agree.

In addition to the legislative intent discussed previously, both equity and conservation of judicial resources favor an interpretation of Code (1113(c) that promotes effective prehearing negotiations. Equity requires it in order to reduce the possibility of variable outcomes resulting from differences in individual judges' points of view on necessity and fairness. Judicial economy requires it in order that trials of these motions do not consume the court's docket. This court does not suggest that it may abdicate its duty to consider the general necessity for and fairness of the Debtor's proposal. The court, however, should not be the primary object of the parties' advocacy. Rather the parties must be encouraged to excell at advocacy in the prehearing negotiation process with the aim

of reaching a consensual solution. As the parties refine their prehearing focus, so must the court refine its focus at trial. When a prehearing stalemate results, the court must focus its considerations at trial more finely. In the case of a stonewall, however, when the court turns to the debtor's proposal itself under Code (1113(c)(1) it must focus on the larger picture: whether the Debtor has shown any necessity for modifications of the magnitude it proposed, whether it made its books and records and any other relevant information on which it based its proposal available to the Union and whether it attempted in good faith to confer with the Union to reach mutually satisfactory modifications. This court finds that Royal has met these burdens.

Royal established at trial it had need for substantial relief under the Union contract and that it had spread the burden

of financial sacrifice. A review of the Debtor's financial history shows that the Debtor filed its Chapter 11 petition virtually at the last moment its tangible assets were sufficient to pay its liabilities. Royal's 1985 year end statement reflects a loss of $225,080 on sales of $5,945,215. The 1985 balance sheet shows assets of $2,575,890, of which goodwill is $897,896 or 34.9%.[19] Shareholders' equity is stated to be $561,726.

Goodwill, although a legitimate balance sheet item, does not represent a tangible asset. In Royal's case, the goodwill item reflects the accounting treatment of a 1976 merger. The only liquidation value that can be ascribed to goodwill is the possibility the Debtor's name might have some unknown value. For the three years prior to 1985, goodwill and shareholders' equity were approximately

equal. In 1985, however, because of the erosion of shareholders' equity caused by operating losses, goodwill exceeds Shareholders' equity by 59.8%. Liabilities exceeded tangible assets at the end of 1985 by $336,170.

The Debtor's liabilities as reflected on its 1985 statement total $2,014,164, comprised of current liabilities (inclusive of the current portion of long term debt) of $1,105,794, long term debt of $689,620, and subordinated long term debt of $218,750 (or $373,750, if the current portion is included). The long term debt, including the current portion, is secured by the Debtor's accounts receivable, work in process and fixed assets, including equipment.[20]

Royal is plainly in need of financial rehabilitation. Its operations have been unprofitable since the economic

slump in 1982 when its sales fell $2 million in one year. Its sales base is eroding, primarily because of Royal's inability to be price competitive. Professor Ralph Gray, Professor of Economics at DePauw University, testified at trial that Royal is an economic anachronism. He caused a survey to be conducted in March 1986 which revealed that type buyers are extremely cost conscious and that the large number of non-union producers has driven prices down to the point where the market price is below the cost per unit of a union shop such as Royal. Professor Gray reviewed the two strategies available to Royal and concluded that Royal lost under either. If Royal meets the market price, it can operate at capacity but it will lose money. If Royal keeps its present prices, volume will drop, and Royal will also lose money. Professor Gray concluded that in order to survive

Royal must end up with a labor cost that is competitive with a non-union shop's labor cost.

Royal needs to buy new equipment at a cost in excess of $600,000 in the next few years. Since 1982, Royal has tightened its belt in many ways. Non-union management and executive salaries were cut in 1982 and again in 1985. Trade associations memberships were eliminated. When Royal moved its plant in 1985 at the expiration of its former lease, even the doorknobs were taken and reused. Royal's new premises are smaller and the rent is significantly less than that sought by its former landlord for a renewal lease. Union labor cost, Royal's single largest expense, is the only expense that has not been cut in the last four years.[21]

Code §1113(b)(1)(A) states that the debtor should base its proposal on the most complete and reliable information available

at the time the proposal is made. Code (1113(b)(1)(B) states that the union is to be provided with such relevant information as is necessary to evaluate the proposal. Royal is not a Fortune 500 company. Although it has outside accountants, much of its financial work is done by its own controller, Roberta Basel, as can be expected. Royal commissioned no outside studies by financial consultants before requesting relief from the Union. It had no fancy graphs or trend lines. When Mr. Haberman first met with Mr. Powers in January 1986, Mr. Haberman had but a single sheet of paper on which were listed some of the Union costs for 1985, being as follows:

"Annuity (13%)	$ 272,485
Welfare Fund (8.9765)	183,326
Benefit & Productivity Fund (15.186%)	278,364
Pension Fund (5.9851%)	122,196
five extra men (caused by "priority" rules), daily hiring charges, training	300,000
TOTAL	$1,156,217

> "Still to come: the impact of four week vacation, double overtime, 6-1/4 hour shifts, extra-ordinary work rules ... Clearly we are talking about more than $1,500,000."

Across the bottom of this typewritten page, the audited sales and loss figures for 1984 and 1985 had been handwritten. This was reliable and relevant information and complete enough to form a basis for reasoned consideration of Royal's proposal. Thereafter, Royal provided supplemental information and permitted the Union's accountant full access to its books and records. The accountant choose to make only two short visits to Royal's premises.

By letter dated April 18, 1986, the Union sent Royal an information request of nine detailed items purportedly required to evaluate Royal's proposal. Some of the items sought information about the basis of Royal's projections of future operations. Others sought itemization of Royal's

estimates of the cost savings which would be derived from each of its proposals. None of this information had been previously requested of the Debtor by the Union's accountant. At trial, the accountant testified that he had not advised the Union that it should request the information sought in the April 18 letter.[22]

The Union had no difficulty in connection with the hearing on the Debtor's request for interim relief on March 21, 1986 in evaluating the dollar effect of the request relative to the four benefit funds. A Union must be assumed to understand the economics of its own contract relative to its members as that is fundamental to the union's role as bargaining agent for the members. The failure of the Union to request the information during the three months following Royal's request for relief reflects that the information was not

fundamental to its ability to evaluate Royal's proposal.

The Union's belated request was simply part of its tactics relative to the rejection motion.[23] In the real world, the basic economics of Royal's situation and proposal could be calculated on the back of the proverbial envelope. This case called for an overview type of economic analysis. For example, in light of the testimony that the Debtor's prices are 15-20% higher than its non-union competitors, one could approach the question of determining the extent to which costs must be reduced by considering the effect of a 15% price reduction. On sales of $4,750,000 that would be $712,500. The amount of subsidiary information and refinements which could be provided or made is endless. Fine-tuning of the Debtor's projections can only occur through discussion, particularly that which accompanies the bargaining

process. Indeed, the Union appears to have recognized this Debtor's need for relief as long ago as 1984 because at that time it unsuccessfully sought certain modifications in the Union contract from The Printers' League on Royal's behalf.

At trial the Union representative pointed to the Debtor's differing responses at various times to how much it expected its losses to be. Projections are necessarily approximations and will differ depending on the different assumptions made. Here, the Debtor's projections developed and changed over a period of time based on refinements and new information. For example, only during the week of April 28 did Royal learn that it would lose a customer accounting for $400,000 of sales in 1985. The Debtor's projections did not include any provisions for funding either a plan of reorganization or the

purchase of new equipment required to keep pace with technological changes.

At trial the Union through its accountant attempted to show that the Debtor's projections were much too gloomy by means of taking the Debtor's historical cost ratios for the last three years and applying them to the Debtor's projected sales. This mechanical manipulation resulted in projected losses for 1987 of $34,204, 1988 of $79,600 and 1989 of $120,108 as compared to the Debtor's projected losses of $1,409,850 in each of 1987 and 1988 and $1,794,600 in 1989.

At Trial, Ms. Basel offered cogent explanations of why the Debtor's projections differ from the historical cost ratio analysis offered by the Union accountant. Ms. Basel discussed her projections at length. Of great importance to her projection is the labor to sales ratio. In 1984 that ratio ranged from

51.2% in the first quarter, historically Royal's best quarter, to 55.81% in the fourth quarter. In 1985, the ratios ranged from a first quarter 48.58% to a fourth quarter 58.75%. Ms. Basel predicts that the labor to sales ratio will rise to 59% in 1986 and up to 78% in 1989. Reduction in the labor to sales ratio would reduce the profitted losses.

Ms. Basel's projections are based on current prices and 10% sales decrease per annum. Although no projections were offered based on Professor Gray's alternative strategy of reduced prices, it is evident that in such projections labor costs would also have to be reduced by increases in productivity or decreases in price or a combination of these.

The savings sought by the Debtor under the Union contract aggregate $868,023 for the balance of 1986, $1,175,754 for 1987, $1,150,879 for 1988 and $806,122 for

the first nine months of 1989. Comparison of the proposed savings with projected losses reflects that the savings are less than the losses. The order of magnitude of the Debtor's request to the Union was appropriate.

The Union's analysis of the Debtor's financial position at trial remained that set forth in a letter dated May 20, 1985 to the BAP Fund from Herman Volk and Co., accountants for the Fund. That letter,[24] which was seen by the Debtor for the first time during the trial, concluded that the Debtor was not experiencing recurring operating losses and was operating on a profitable basis. The accountant reached this conclusion by excluding payment to former shareholders from operating expenses. Similar payments were made to former shareholders in 1985. In addition, moving expenses were incurred in 1985. The moving expenses are likewise not recurring

operating expenses, but they still must be reckoned with as a legitimate and necessary corporate expense. The Union did not discuss the details of its economic analysis with the Debtor during the prehearing negotiations.

Mr. Haberman, when taxed with questions for the first time at trial about the propriety of the payments to the former shareholders, stated that in his judgment that the payments were legitimate corporate expenses. A number of the payment arrangements were made in lieu of the terms of existing contracts by which Royal was bound. He further stated that deferments of various payments to former shareholders had been obtained in 1983 and at other times. As to the payments to Mr. Jack Gabow, Mr. Haberman stated that they were for a non-competition agreement pursuant to which Mr. Gabow left his sales with Royal and that it was important to Royal to have

the sales. Mr. Haberman was of the view that it was inappropriate for him to request any further concessions from these individuals.

This court does not find the Debtor's views on the shareholder payment issue unreasonable.[25] In any event, the former shareholder payments are irrelevant to Royal's projections since no payments to the former shareholders were included in the expense items. The Debtor has not proposed a plan of reorganization yet and what its ultimate treatment for these persons might be is speculative. In light of the subordinated nature of much of these obligations and of the insufficiency of tangible assets discussed above, these persons' prospects for a 100% distribution under a plan seem far from certain. In all events, a 100% distribution would appear to be possible only in the form of a long-term pay-out.

The second major point about the equities of sacrifice made by the Union for the first time at trial is the level of executive compensation. Mr. Haberman's salary is $200,000 per year. Edwin Horn, the other shareholder and executive, has an annual salary of $235,000. In addition, Mr. Horn is reimbursed entertainment and other expenses of in excess of $50,000 per year. In 1982, Messrs. Horn and Haberman each received $300,000. In 1983, each of them took a 50% pay cut, or $150,000 as part of a package of expense reductions totalling $825,420. At that time, a Mr. Minson was still a shareholder and executive of Royal and also received $150,000 per year. Mr. Minson was forced to retire during late 1984. The aggregate received by Messrs. Horn, Haberman and Minson in 1984 was $435,000. Upon Mr. Minson's retirement, Messrs. Horn and Haberman increased their compensation to

$235,000 and $200,000 respectively, thus partially restoring the 1983 reductions.

Mr. Horn is Royal's chief salesman. He is responsible for the production of the bulk of Royal's sales, which are to the nation's leading advertising agencies. Royal has three other salaried salespersons, whose salaries range from $65,000 to over $100,000. In the past Royal has had commissioned salesmen. These persons left to join non-unionized typography shops whose growth potential and competitive position was better due to lower product prices, and who therefore offered greater commission potential. Mr. Horn's contacts in the advertising industry and proven sales record indicate that it is reasonable to believe he could secure other employment and receive a commission of 10-15%. That would amount to over $400,000 per annum, an amount significantly in excess of his present salary. Although

high, Mr. Horn's expenses are necessary for the production of business. Mr. Horn's personal social life revolves around his business clients. It appears to the court that it is Mr. Horn's personal and life-long contacts with persons in the largest advertising agencies in the United States which has allowed Royal to continue over the last few years against the odds. Indeed, Mr. Haberman expressed the view that he wished Mr. Horn would even spend more on entertainment than he does now.

Mr. Haberman is responsible for all areas other than sales. In 1985, Mr. Haberman was responsible for coordinating, planning and executing Royal's move from its existing premises on which the lease was expiring to its present space. He also did the architectural and design work. He speaks to Ms. Basel, Royal's controller, five to seven times a day by telephone. He speaks to Mr. Horn at least a few times a

week by telephone. Mr. Horn depends on Mr. Haberman to handle the operational side of the business. Mr. Horn regards Mr. Haberman's advice about handling sales problems as invaluable. Mr. Haberman provides long-range planning for Royal. He goes to Royal's premises approximately once a month, although he went there more frequently while planning for the move was in progress. No testimony was introduced that Royal, whose work is principally performed at night, was poorly managed.

A witness for the Union testified that executive salaries at certain non-union shops were less than $100,000 per annum. During late 1985, Messrs. Horn and Haberman took a pay cut in the form of a compensation deferral of 21% and 26%, respectively. Whether Mr. Haberman's compensation is reasonable for the services he renders is a matter of judgment on which reasonable people could differ.[26] This

court cannot find the Debtor's failure to make additional executive compensation reductions beyond those made in 1982, and partially restored in late 1984, and then partially deferred in late 1985, as part of its proposal to be unreasonable in the absence of any prehearing articulation by the Union that executive compensation levels were too high or should be reduced. Moreover, even significant cuts in executive compensation would not have given Royal economic relief on the order of magnitude required for its survival.

Many of the Debtor's proposed modifications in the Union contract dealt with enhancing flexibility in labor utilization and represented possible opportunities for financial cost-free concessions by the Union. For example, the Debtor sought to be permitted to allow its union employees at their option to take one-day vacations on Friday in the summer,

a practice presently prohibited by the Union contract, because many of the Debtor's clients close for a half or whole day on Fridays in the summer. The Union refused to agree to this proposal. Certainly some of Royal's workers would like the opportunity to have at least some three-day weekends during the summer. While it is possible to conjure up abuses by the employer or employee of a one-day vacation provision, the basic concept is one that is at least as pro-employee as it is pro-employer. Likewise, the Debtor sought substitution of certain holidays because the contract holiday schedule is not coordinated with that of the Debtor's clients. The Union again declined to agree and pointed out at trial that as a matter of practice an employer desiring to substitute holidays must give employees 2 days for 1.

The Debtor also sought changes in certain work rules, such as starting times, tied to priority. Again in concept the changes are not inherently unreasonable. The Debtor will in the future be faced with enormous competitive pressure which will require it to have maximum flexibility, including with respect to utilization of its unionized labor, in order to mold and adapt in a changing business environment.

The Union has questioned the need for any alteration of existing priority, or seniority, rules. The court is persuaded that a proposal providing for some intrusion on the priority system was not inherently unreasonable. The Debtor's unionized work force has declined from over 130 to 31 in recent years. The Debtor has been forced to lay off a number of what it views as its most competent workers because layoffs must be made in strict order of seniority. A reduction in scale of this

size made on a strict seniority basis is unlikely to produce the same work force that layoffs made on a merit basis would produce. Of the eleven employees in the compositor classification, none was hired after 1965. In the operator class, all but two have dates to hire in or prior to 1968. The Debtor's most competent operator was hired in 1976 and is exempt from seniority layoff as long as she does training and supervisory work only and does not perform operator class work herself.

The Union points to provisions of the contract that allow workers to be discharged for incompetency. The Debtor's response is that in reality it would be unsuccessful if it sought to discharge workers for incompetency. It is unimportant whether the Union or the Debtor is correct since this dispute merely reinforces the need for prehearing

negotiations at which these issues could be thrashed out.

There are a number of possible solutions to the priority issues. The Union could, for example, have proposed that employees could be laid off out of turn only if they received a lump sum severance payment. During the trial, the Debtor proposed that it is be authorized to discharge up to five workers without regard to seniority.

Having reviewed the facts, the court will turn again to the Third Circuit's decision in the Wheeling-Pittsburgh case. The meaning of "necessary" as used in Code §1113(b)(1)(A) and incorporated by reference in Code §1113(c)(1) is the central focus of the Third Circuit's decision, the first Court of Appeals decision to consider Code §1113. The court found that there were two aspects to a court's inquiry into necessity: (1) the

standard to be applied, i.e., "how necessary" must the proposed modifications be, and (2) the object of the "necessary" inquiry, i.e., "necessary to what."

The Third Circuit found that the emphasis in "necessary to what" was "on the reorganization, rather than the longer term issue of the debtor's ultimate future." Slip Opinion at 32. Here there appears to be no meaningful distinction between reorganization and Royal's ultimate future. If Royal can reorganize by lowering its union labor costs, it has a future; if it cannot, it does not. Moreover, reorganization requires that the future be considered because in order to confirm a Chapter 11 plan the court must find

> "Confirmation of the plan is not likely to be followed by the liquidation or the need for further financial reorganization of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." Bankruptcy Code §1129(a)(11).

As to how necessary, the Third Circuit found:

> "The congressional consensus that the 'necessary' language was substantially the same as the phrasing in Senator Packwood's amendment, which looked to the 'minimum modifications*** that would permit the reorganization,' requires that 'necessity' be construed strictly to signify only modifications that the trustee is constrained to accept because they are directly related to the Company's financial condition and its reorganization. We reject the hyper-technical argument that 'necessary' and 'essential' have different meanings because they are in different subsections. The words are synonymous." Slip Opinion at 31-32.

This Court finds no synonymity in the terms. Essential is used in Code §1113(e) in connection with interim relief. It is only proper that interim relief, which can be viewed as a type of preliminary or provisional remedy, should be limited to the bare minimum, or essential, requirements of the Debtor,

particularly as it will frequently be necessary to consider interim relief before the debtor's proposal can be refined through the negotiation process. However, the final modifications, dealing as they must with the uncertainties created by a longer period of time and the larger picture of a debtor's reorganization and economic future and considered after the parties have an adequate opportunity for negotiation, neither can nor should be so finely tuned to bare survival. Therefore, the standards is that the modifications be necessary. A debtor can live on water alone for a short time but over the long haul it needs foot to sustain itself and retain its vigor.

The Union urges that the Third Circuit would find Royal's proposal was not necessary or essential.[27] That may be. However, this court finds that Royal established its need for relief on the

order of magnitude requested was necessary to Royal's economic survival. It established that it had in good faith attempted to negotiate for necessary changes but had been unsuccessful because of the Union's unwillingness to engage in serious discussions. This court urged the parties to negotiate beginning with the interim relief hearing and continuing even during the trial to no avail. Royal established that tne balance of the equities favored rejection in order that Royal might have an economic future. Both of Royal's experts opined that Royal's proposal was essential to its future survival.[28] This court is satisfied that this Debtor has done the best that can be expected of it under all the circumstances and that no greater showing of necessity can be expected before rejection of the collective bargaining agreement should be permitted.

The court finding that the requirements of §1113(c) have been met, Debtor's application for rejection is hereby granted.

It is so ordered.

Dated: New York, New York
June 16, 1986

Prudence B. Abram/s/
United States
Bankruptcy Judge

FOOTNOTES

[1]/ The wage scale for the Union workers ranges from $669.29 to $742.91 per week. Including overscale only, the annual wages of union members range from $34,803.08 to $63,687.52. If fringe benefits and employers' obligation for social security and the like are included, the annual wage cost ranges from $54,361.82 to $96, 167.82.

The majority of Royal's non-union employees are messengers, who are paid the federal minimum wage. The bookkeeping and billing and pricing employees receive $15-$25,000 per year. Royal's controller is paid approximately $40,000 per year. Royal's non-union workers have for the most part been with Royal for over 6 years.

[2]/ There are other provisions which might potentially be used for this purpose. For example, Code §105(a), the so-called all-writs section, might permit creation of the office of "labor negotiator." Compare In re Johns-Mansville Corp., 36 B.R. 743, 758 (Bankr. S.D.N.Y. 1984) (Appointment of representative for future claimants appropriate as "courts readily use their equitable powers to protect the substantive rights of persons similarly situated who are not before the court."), leave to appeal denied, 39 B.R. 234 (D.C. S.D.N.Y. 1984). See also U.S. v. Sutton, 786 F.2d 1305, 1307 (5th Cir. 1986) (Code §105(a) simply authorizes a bankruptcy court to fashion such orders as are necessary to further the purposes of the substantive provisions of the Bankruptcy Code). A trustee would supplant the debtor-in-

possession, not assist it. An examiner's role is investigative. The court need not consider whether a special master might be able to so function as the bankruptcy court is forbidden to appoint a special master. See Bankruptcy Rule 9031. Although the bankruptcy court would appoint an expert under Rule 706(a) of the Federal Rules of Evidence, an expert's function would appear to be limited to rendering opinions to assist the court as the trier of the fact to understand the evidence or to determine a fact in issue. See Rule 702 of the Federal Rules of Evidence and Bankruptcy Rule 9017. Under Fed. R. Civ. Pro. 16, made applicable by Rule 7016, a judge may direct the parties to appear for a conference before trial for, among other purposes, facilitating the settlement of the case. The court's role as trier of fact makes it preferable that a third party be involved if, as here, settlement negotiations are likely to be extensive or require discussion of matters that are unlikely to become matters of record at any trial. This court concludes that, until Congress explicitly provides for the court to intrude on the parties' labor negotiations in this way, the court should not attempt to innovate. The parties could perhaps contract for the appointment of a labor mediator in the event of a Chapter 11 filing by the employer.

[3]/ The citations are to the legislative history as collated in Collier on Bankruptcy, 15th Ed. (1985), Appendix 3.

[4]/ Code §1113(c) provides as follows:

> "(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that --
>
> "(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);
>
> "(2) the authorized representative of the employees has refused to accept such proposal without good cause; and
>
> "(3) the balance of the equities clearly favors rejection of such agreement."

[5]/ This tactic has been endorsed by at least one commentator. Gibson states:

> "[A] union can safely reject any proposal that is not necessary for the reorganization of the debtor or that unfairly burdens the unionized workers relative to other parties. Any union which rejects a proposal for other reasons, however, does so at its own risk.***
>
> "This analysis, however, leaves open a large question. Assume that a union is too sophisticated to flatly reject a proposal that meets the 'necessary' and 'fair

> and equitable' requirements of section 1113(b)(2). Assume that it instead makes counter-proposal which, while offensive to management and favorable to the union, contains only modifications 'necessary' to the reorganization and 'fair and equitable' to all parties. Is it 'good cause' to reject the debtor's proposal that the union's counter-proposal is equally acceptable under section 1113(b)(2)?" At 341.

As the balance of this opinion makes clear, this court is of the view that genuine counterproposals by the Union must be encouraged because they assist the parties in reaching a negotiated compromise. If the Union's proposal and the Debtor's proposal were in fact equally acceptable, the balance of the equities, see Code §1113(c)(3), would not be likely to tip in the Debtor's favor.

[6]/ The Wheeling-Pittsburgh case nicely illustrates this. The Bankruptcy Judge considered and rejected the union's argument that the debtor's proposal was inequitable because it did not provide for any upward adjustment in the labor rate to ensure that the employees would share in whatever benefits might eventuate if the company did better than it had projected:

> "It is relevant to note that the proposal also does <u>not</u> provide for any downward adjustment below the $15.20 in the event that the Company continues to lose money.

> The steel industry and this Company are in serious financial trouble. It might not be inequitable to ask hourly employees to share in future shortfalls, but that has not been done. In any event, the proposal provides cost stability for the Company, and also provides wage stability for Union workers."

In re Wheeling-Pittsburgh Steel Corp., 50 B.R. 969, 980 (Bankr. W.D. Pa. 1985).

The Third Circuit did not find this argument persuasive. "The workers did not ask for or need 'wage stability' at a rate they considered substandard. Therefore, such 'stability' cannot be considered to be a benefit to them to compensate for the absence of any share of better-than-anticipated recovery." In re Wheeling-Pittsburgh Steel Corporation, ___ F.2d ___, Slip Opinion at 41 (3d Cir. May 28, 1986). The Third Circuit also faulted the Bankruptcy Court for not discussing the "necessity" for the absence of a "snap back" provision. Slip opinion at 35.

[7]/ Once freed from the shackles of conventional wisdom on a subject the human mind is capable of great flights of creativity as human ingenuity appears to know no bounds. The bankruptcy court must carefully balance a debtor's need to be free of the confining restraints of various terms of a negotiated labor agreement against a union's desire not to have to renegotiate each and every term of an existing agreement, and thereby reinvest the wheel. The needs to be served must

guide the parties to strike a reasoned balance between the new and the old.

[8]/ Even after Royal filed its Chapter 11 petition, the Union still appears to have been concerned that bargaining individually with the Debtor would imperil the contract as it related to other employers, to prospects for the contract's renewal in 1989, and to a pending arbitration in which the Union has sought substantially increased benefits.

[9]/ Royal's March 3 proposal called for (1) elimination of all contributions to the Benefit and Productivity Fund (the "BAP Fund"), a fund established in 1975 to provide compensation to persons laid off as a result of the introduction of new technologies; (2) elimination of all contributions to the Union Welfare Fund, with Royal to provide substantively comparable coverage directly; (3) elimination of all contributions to the Pension and Annuity Fund, with union employees instead to participate fully in Royal's profit-sharing and 401(k) plans; (4) the work week to be 35 hours, with some employees scheduled for a 4-day work week, particularly in summertime; (5) no April 1, 1986 increase; (6) delete all language giving the Union the right to ask the arbitration to order any contract changes and the Union to withdraw all existing arbitration demands to Royal and the rest of the industry; and (7) delete Lincoln's Birthday, Columbus Day and Election Day and add the day after Thanksgiving, 1/2 day Christmas Eve and New Year's Eve and 1 Religious/Ethnic Holiday. Royal's proposal

did not call for any direct wage reductions and its reductions were directed at elimination of fringe benefit payments which in Royal's opinion did not benefit Royal's union employees, except to a limited extent.

[10]/ Given the result of the prior year's review, Royal was entitled to be skeptical about the likelihood relief would be granted.

[11]/ At about this time, the Union suggested to the Debtor's principals that they would be personally liable under New York law for the amount of interim relief granted on the grounds that such amounts would be unpaid wages. The principals were naturally extremely concerned because of the size of the amounts in question. This matter was resolved by the Union obtaining waivers from the benefit funds of any such personal liability and obtaining authority from the employees to give a waiver.

[12]/ The interim relief granted Royal relieved it of the obligation to make any payments to any of the four Union benefits funds. These fringe benefit payments total 46.1% of wages. Some appreciation of the extraordinary magnitude of the benefit fund payments can be gained by resort to history. At September 1, 1975, fringe benefits were 10.6222% of wages. As of December 1, 1975 they jumped to

20.6222% of wages. On July 1, 1978, they reached 30.8072%. Less than two years later by April 1, 1981, they had jumped over 40% to 41.8529%.

[13]/ The closest the Union came was in a March 21 affidavit submitted in connection with the hearing on interim relief. The affidavit details what the Union's representative says he was told by its accountant, who had restricted his examination to Royal's short term financial situation. According to the affidavit, the accountant's examination had raised questions about the severity of Royal's short term financial situation and, in particular, its cash needs. The affidavit states that the interim relief request would have (except for one item) no immediate cash flow effect because the amounts were not required to be paid prior to May 1.

There is, of course, a significant difference between a profit-and-loss analysis and a cash flow analysis. A company can be operating profitably and yet have cash flow problems. Conversely, a debtor can be operating at even a substantial loss, and not experience a cash flow problem over the short term. While either a cash flow problem or operating losses may be appropriate reasons for interim relief, Royal has consistently emphasized that its problem is operating losses. See Code §1113(e) (Interim relief can be granted "if essential to the continuation of the debtor's business,

or in order to avoid irreparable damage to the estate"). If interim relief were requested only because of a cash flow problem, the court would have to consider possible alternative sources of financing available to the debtor before granting the Debtor's request.

[14]/ The Union's counterproposal provided that (a) the work week would be extended from 32-1/2 hours to 34-1/2 hours; (b) by mutual consent, workers would have a work week of 4 8-hour shifts, with the same pay as for a 5-day work week of 34-1/2 hours; (c) delete the BAP Fund payments by requiring the Debtor to pay benefits to persons holding priority in the same manner and amount as they would have been entitled to receive from the BAP Fund; (d) the 3% annual wage increase would be deleted; (e) Royal would be allowed to reduce the wage scale or the annuity fund contributions upon approval of the majority of the chapel by secret ballot vote with one reduction to be a loan with interest at prevailing money market rates repayable from profits with 50% of the loan to be a personal obligation of the owners in the event the firm was closed; and (f) adjust the Welfare Fund and the Negotiated Pension Fund contributions to provide the same amount to the funds that would have been paid if no wage or annuity fund reduction had been made.

[15]/ The Debtor made several amended proposals between March 3 and the start of the rejection trial. Analysis of the differences is not material to the motion.

[16]/ Mr. James Grottola, the Union representative, testified that the Debtor raised priority for the first time at the April 17 meeting. Although this may be the first time Mr. Grottola realized it, the Debtor's rejection application filed on March 19, clearly contains reference to priority and work rule changes. More interestingly, it suggests that prior to April 17 the Union had even less reason for declining to negotiate with Royal since priority was not an issue.

[17]/ It is to be hoped that over time as experience with Code §1113 is gained that it will become the nonjudicial issue that adequate protection for secured creditors has become, in this district at least, because the parties will resolve the matter through negotiation. At least one possible approach would be for the parties to stipulate to interim relief and agree to delay the hearing on the rejection motion in order to determine whether the stipulated modifications work or should be amended and when and how they would be converted into permanent changes.

[18]/ The Union was at least as motivated by principle. For example,

Mr. Powers admitted that he felt morally obligated to uphold the Benefit and Productivity Fund, to which Royal is obligated to contribute an enormous 15.186% of wages, because it was established in the 1975 contract and pays benefits to and promotes the social welfare of Union members who had been laid off.

[19]/ For the year ended December 31, 1982, Royal's audited balance sheet reflects total assets of $2,903,667, of which good will accounted for $946,685, or 32.6%. Shareholders' equity in that year is stated to be $919,481, or less than the amount of the stated good will. Royal's income in 1982 was $6,513,522 and it had an operating loss of $545,236. Royal's audited balance sheet for the year ended December 31, 1983, reflects total assets of $2,642,599, of which good will was $946,685, or 35.8%. Shareholders' equity in 1983 was $1,009,055. On its 1983 sales of $6,237,119, the Debtor's net income was $89,574. In 1984, Royal's year end statement reflects assets of $2,953,318, of which good will accounts for $946,685 or 32.1%. Shareholders' equity was $936,803. On its 1984 sales of $6,804,401, the Debtor lost $72,252.

[20]/ The secured creditors appear to be fully collateralized. There is no reason apparent to this court why a fully secured creditor should have to make any sacrifice before rejection

can be permitted. Of course, a creditor who would not be fully secured in the event of liquidation may well be required to make concessions in order to obtain the reorganization-enhanced value of its collateral.

[21]/ Royal, as it is permitted under the contract to layoff union workers at its discretion, has laid off union workers during this period. However, for retained union workers, Royal made all payments required by the Union contract prior to the Chapter 11 filing, including payments which were required to "retrain" laid off workers in other job classifications at Royal.

[22]/ At the time that it received the Union's letter, the Debtor did not have all of the information sought in the form requested. In particular, the debtor did not have detailed schedules of the projected wages and fringe benefits for Union workers broken down as requested. The Debtor hired George Robbins, a consultant to the graphic arts industry, to prepare the requested schedules following receipt of the Union's letter. By letter dated May 1, 1986, the Debtor supplied to the Union the information requested in its April 18, letter, including detailed schedules prepared by Mr. Robbins. Mr. Robbins stated at trial that the preparation of the schedules had been a fairly simple

task on his personal computer using a standard spread sheet program.

[23]/ The Union's follow-up letter of April 30 to Royal's attorney self-servingly states:

> "It appears from Royal's refusal to so provide the requested information, that it has no intention of discussing this matter further with us in a way which will allow us to intelligently evaluate Royal's position."

The April 30 letter was mailed and not received by the attorney until May 2, the day after Royal delivered the requested information by hand to the Union.

[24]/ In its entirety, the letter reads:

> "The financial statements of Royal Composing Room, Inc. reflect net loss for the year 1984 of $62,252 and net income for the year 1983 in the amount of $111,674. The loss for 1984 is the result of a buy out of a stockholder with the payment of $75,000 in severance pay and $61,250 for a non-compete provision, both of which are not recurring.
>
> "The sales for the year 1984 were $6,798,311 as compared to the year 1983 sales of

$6,173,741, an increase of $624,570.

"The company has been purchasing the shares of stock of various stockholders for a number of years with various costs applied to the operations. As of May 20, 1985, the remaining officers are Mr. Daniel Haberman and Mr. Edwin Horn. The payments of interest to past shareholders in 1984 was $34,295 and for 1983 $52,084, which amounts were included in operating expenses.

"The company financial statements does not reflect recurring operating losses. The balance sheet states that the accounts receivable have substantially increased, while the cash position has remained the same.

"It is therefore our opinion, that Royal Composing Room, Inc. is operating on a profitable basis, and the request for employer subsidies should be denied at the present time."

[25]/ The payments to former shareholders conferred a personal benefit on Messrs. Horn and Haberman because they each became 50% shareholders through the payments. Mr. Haberman stated at trial that in his view the stock was worthless and that the payments to the various former stockholders were made to keep Royal alive.

[26]/ Ms. Basel, who took a pay cut in 1985, deals closely with Mr. Haberman. Although not directly questioned on the issue at trial, Ms. Basel's demeanor at trial never suggested that she harbored any sense of grievance at either Mr. Horn's or Mr. Haberman's level of compensation or thought them inappropriate.

[27]/ There are a number of important factual distinctions between Wheeling-Pittsburgh and this case. In Wheeling-Pittsburgh the court was confronted with a motion for rejection by a large company seeking an actual wage reduction in which the bargaining process was advanced at the time of the hearing, and in which the hearing was held only a few weeks after the case was filed and in which no interim relief was requested. Royal is not a large company, it has consciously avoided requesting a wage reduction and seeks only the elimination of benefit fund obligations, the bargaining process had progressed little, if at all, over the almost two months before the hearing commenced, and interim relief had been requested and granted.

[28]/ Mr. Robbins, who for many years was employed by the umbrella organization of which the Printer's League is part and who has extensive familiarity with cost analysis under the contract, opined as follows:

> "Q. Have you formed any conclusions with respect to the proposal"?

"A. I have reached the conclusion that unless the proposal is enacted, Royal Composing Room cannot survive." Transcript 5/13/86 at 141.

APPENDIX D

SDNY
86-CV-4849
KEENAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of August one thousand nine hundred and eighty-eight.

Present: HON. WILFRED FEINBERG
HON. GEORGE C. PRATT, CJJ
HON. JOSEPH M. MCLAUGHLIN*

IN RE: ROYAL COMPOSING ROOM, INC.,

Debtor,

NEW YORK TYPOGRAPHICAL UNION NO. 6

Plaintiff-Appellant,

- against -

ROYAL COMPOSING ROOM, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of

New York.

This cause came on to be heard on the transcript of record from the United Sttes District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with the cost to be taxed against the appellant.

ELAINE B. GOLDSMITH,
Clerk

By: Edward J. Guardaro /s/
Edward J. Guardaro,
Deputy Clerk

* For the Eastern District of New York, sitting by designation

ISSUED AS MANDATE:
August 23, 1988

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of August one thousand nine hundred and eighty-eight.

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IN RE: ROYAL COMPOSING ROOM, INC., :
Debtor, :
NEW YORK TYPOGRAPHICAL UNION NO. 6 :
Plaintiff-Appellant, :
- against - :
ROYAL COMPOSING ROOM, INC., :
Defendant-Appellee. :
----------x

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, New York Typograhical Union No. 6.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith /s/
By: Elaine B. Goldsmith
Clerk

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No.

A-333

New York Typographical Union, No. 6,

Petitioner,

v.

Royal Composing Room, Inc.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including

December 4, 1988.

s/ Thurgood Marshall
Associate Justice of the
Supreme Court of the
United States

Dated this 26th
day of October, 1988.

No. 88-1108

(3)

Supreme Court, U.S.
FILED
FEB 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

In re: ROYAL COMPOSING ROOM, INC.,

Debtor.

NEW YORK TYPOGRAPHICAL UNION NO. 6,

Petitioner,

—against—

ROYAL COMPOSING ROOM, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

MICHAEL D. HESS
Counsel of Record
HALIBURTON FALES, 2D
OWEN C. PELL
WHITE & CASE
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8200

JOHN S. MARTIN, JR.
SCHULTE ROTH & ZABEL
900 Third Avenue
New York, New York 10022
(212) 758-0404

Attorneys for Respondent

31 pp

Counterstatement of Questions Presented

1. Can the petitioner Union challenge for the first time on appeal one specific element of Royal Composing Room's post-petition proposal under 11 U.S.C. § 1113 after refusing to negotiate alternate modifications to the union contract and failing to offer evidence at trial regarding specific elements of Royal's proposal?

The United States Court of Appeals for the Second Circuit held that the Union could not "belatedly" attack one element of Royal's proposal on appeal.

2. Should Royal Composing Room be permitted to modify its union contract under 11 U.S.C. § 1113 where uncontradicted evidence in the record showed that to survive Royal needed all the modifications in its post-petition proposal including work rule changes?

The Court of Appeals, agreeing with the factual conclusions of two lower courts, agreed that it should.

Statement of the Parties to This Proceeding

Respondent Royal Composing Room, Inc. is a closely held corporation and has no subsidiaries or affiliates.

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No. 88-1108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

In re: ROYAL COMPOSING ROOM, INC.,

Debtor.

NEW YORK TYPOGRAPHICAL UNION NO. 6,

Petitioner,

– against –

ROYAL COMPOSING ROOM, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 848 F.2d 345 (2d Cir. 1988). This decision affirmed the decision of the District Court which is reported at 78 Bankr. 671 (S.D.N.Y. 1987), which had affirmed the decision of the Bankruptcy Court. 62 Bankr. 403 (Bankr. S.D.N.Y. 1986).

Statutes and Regulations Involved

11 U.S.C. § 1113 (Supp. II 1984) is reproduced in the Appendix following the brief.

I.

Statement of the Case

This case arises out of the bankruptcy and reorganization of Royal Composing Room, Inc. ("Royal"), a high-quality advertising-typography shop. Following a seven-day trial, the bankruptcy court overseeing Royal's reorganization ruled that Royal could reject its collective bargaining agreement (the "Contract") with the petitioner, New York Typographical Union No. 6 ("Local 6") under 11 U.S.C. § 1113. Based on the extensive and well-documented record before the Bankruptcy Court, the District Court and Court of Appeals affirmed the Bankruptcy Court's findings of fact summarized below.

Formed in 1975 by the merger of two unionized typesetting companies which dated from the 1920's, Royal competed in a labor and capital-intensive industry. Although Royal initially flourished, in the early 1980's radical new technology began changing the typography industry and with it Royal's fortunes. With the advent of computerized typesetting equipment, typography shops requiring less capital and fewer skilled workers prospered, and the number of non-union shops, charging lower prices, increased. *See* 62 Bankr. at 404, 412.

Faced with falling prices, increased competition and high union labor costs, Royal began to lose money rapidly. Even with extensive cost-cutting measures aimed at all parts of its business *except* union labor costs, Royal's gross revenues plummetted and it lost over $1 million between 1982 and 1986. 78 Bankr. at 672.[1]

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[1] Royal established at trial that beginning in 1983 it tried to salvage its deteriorating financial condition by effecting major cost savings. *Not one* of these savings was at the expense of Local 6 workers. Royal's efforts led the Bankruptcy Court to conclude that "[u]nion labor cost, Royal's single largest expense, is the only expense that has not been cut in the last four years." 62 Bankr. at 412 (footnote omitted). *See also id.* at 405 n.1 (outlining union wage costs).

Prices had been driven "down to the point where the market price [was] below the cost per unit of a union shop such as Royal." 62 Bankr. at 412. Based on the extensive expert testimony in the record, the Second Circuit agreed with the Bankruptcy Court that Royal had become "an economic anachronism." 848 F.2d at 346. Indeed, as the Union candidly concedes, Royal is now one of the last unionized advertising-typography shops in New York. Petition at 7.[2]

Faced with mounting losses, Royal filed its Chapter 11 petition in March 1986. In seeking modification of Local 6's Contract under §1113, Royal's post-petition, pre-application proposal (the "Proposal") consisted of terms that Royal had been discussing with Local 6 over the 10 months preceding Royal's bankruptcy, and which were now required for Royal's reorganization:[3] (1) Royal sought to substitute less expensive benefit plans for the contribution plans required under the Contract; (2) Royal sought the elimination of certain work rules relating to priority, job classification and training;[4] (3) Royal asked Local 6 to forego an April 1, 1986 3% wage increase; and (4) Royal asked Local 6 to withdraw arbitration demands through which Local 6 was seeking further benefits and pay hikes under the Contract. *See* 62 Bankr. at 408 nn. 8 & 9.

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[2] "Petition at ____" refers to Local 6's Petition for a Writ of Certiorari.

[3] Extensive evidence established that Royal began discussing these proposed modifications to the Local 6 Contract in May 1985. Further meetings on the modifications eventually contained in Royal's Proposal also were held on January 17, February 12 and March 3, 1986. 62 Bankr. at 408-09. Royal's Proposal was, therefore, neither new nor surprising to Local 6 and Royal consequently moved for rejection of the Contract immediately. There was then an approximately two-month pretrial bargaining period. *Compare* Petition at 9.

[4] *Priority* is a requirement that employees can *only* be laid off in order of seniority regardless of their comparative competency, merit or technical skills.

Classification rules divide employee job functions at Royal into five discrete and fixed categories. The Contract forbids Royal from using for any extended period of time an employee from one classification on a job covered by a different classification, even if the employee is capable of doing the job.

(*Footnote continued*)

Local 6 responded to Royal's bankruptcy and its §1113 Proposal with a stonewall. Throughout the pretrial bargaining period Local 6 would not change so much as a comma in the Contract. *See* 62 Bankr. at 408-09.[5] The trial judge found that

> *[t]he small number and short length of the meetings had is attributable to the Union.* The Debtor was continuously available for and sought other meetings. . . . At no time prior to May 5, did the Union make a counterproposal, comment item by item on the Debtor's proposal or the Debtor's financial situation, or state any reasons why it found the Debtor's request to be unfair or inequitable.

Id. at 409 (footnote omitted) (emphasis added).[6]

Training rules allow an employee who is laid off in one classification but has seniority (priority) over someone else in another job classification, to demand retraining for the other person's job. This thereby forces the layoff of a more junior employee with more experience and competence in this other job classification. Royal then has to pay both for the training costs and also for the time spent by other employees in overseeing the trainee employee in his new job. 62 Bankr. at 417. Royal's Proposal also sought relief from certain holiday and vacation rules. *Id.* at 416.

[5] Indeed, "[t]he Union made it clear that the workers would in all likelihood strike if rejection were permitted [even though a] strike alone could force [Royal] to close permanently." 62 Bankr. at 405. Such tactics were not unusual for the President of Local 6, Bertram Powers. It was Powers, President of Local 6 since 1961, who called the disastrous 114-day strike against New York's newspapers in late 1962 that resulted in the eventual closing of four New York dailies: the *Mirror*, the *Herald Tribune*, the *Journal-American* and the *World Journal Tribune*. BIOGRAPHICAL DICTIONARY OF AMERICAN LABOR 470-71 (G. Fink ed. 1984); CURRENT BIOGRAPHY YEARBOOK 1974 324-27 (C. Moritz ed.)

[6] Local 6 now labels its conduct as "engag[ing] in limited negotiations." Petition at 29 n.12. Local 6's counterproposal was made by Local 6's attorney orally during the final pretrial conference. Even the trial judge noted the inappropriateness and incongruity of the counterproposal, which "did not conform to the format of or respond directly to Royal's request . . . [and] provided significantly less economic relief" than Royal needed. *See* 62 Bankr. at 409-10 & n.13.

On May 8, 1986, a seven-day trial commenced. Royal's witnesses included economic and financial experts in the typography field.[7] Royal also submitted numerous financial and other exhibits documenting its need for relief from the Contract. Royal *specifically proved* that the priority, training and job classification work rules in its Proposal would cost Royal over $1.9 million between 1986 and 1989 and that these rules were also extremely wasteful of plant time and resources. Royal also showed that it would require all the projected savings in the Proposal *just* to survive and undertake reorganization.

Significantly, Local 6 did *not* contest the accuracy of Royal's evidence showing the savings to be expected from each part of the Proposal. Instead, both during the pretrial bargaining period and at trial, Local 6 chose to treat Royal's Proposal as "an aggregate" and "declined to respond to particular items" of Royal's Proposal. 62 Bankr. at 410.

Local 6 tried to counter Royal's evidence, and explain its failure to negotiate Royal's Proposal, by relying on a May 1985 accountant's report advising that Royal did not need any financial relief and, indeed, that Royal was operating at a profit. Discounting the accountant's report, the Bankruptcy Court noted that the report was simplistic and flawed, *intentionally ignoring* Royal's present and continuing operating losses. Local 6's projections of Royal's future performance were similarly rejected as a "mechanical manipulation" of historical cost ratios that did not account for the burgeoning labor-to-sales ratio at Royal. *See* 62 Bankr. at 409 n.13, 414-15.

After weighing the evidence, the Bankruptcy Court concluded that "Royal is plainly in need of financial rehabilitation." 62 Bankr. at 412. *See id.* at 411-14 (detailing Royal's losses). Moreover, in assessing the necessity for and fairness of Royal's

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[7] Royal's experts included a professor of economics from a major university and a financial expert who had worked in the typography field for many years and had "extensive familiarity with cost analysis under the [Local 6] contract . . . ." 62 Bankr. at 412, 418 n.28.

Proposal, the court held that "[c]omparison of the proposed savings with projected losses reflects that the savings are less than the losses." *Id.* at 414. Thus, Royal's Proposal *barely met* the savings needed just to attempt reorganization. All the modifications in the Proposal, including the proposed changes in priority, were therefore, by definition, necessary to Royal's reorganization. *See* 62 Bankr. at 417 ("Here there appears to be no meaningful distinction between reorganization and Royal's ultimate future. If Royal can reorganize by lowering its union labor costs, it has a future; if it cannot, it does not."). Finding that the trial record supported the findings of the Bankruptcy Court the Southern District of New York affirmed. *See* 78 Bankr. at 673-74.

On appeal to the Second Circuit, the Union for the first time "narrowed the focus of its attack on Royal's proposal" by trying to challenge only the "necessity for eliminating priority." 848 F.2d at 347. The Court of Appeals rejected this approach, however, holding that where the union has failed to focus on any specific aspect of the debtor's proposal before, it cannot then do so *on appeal*. Thus, having chosen to treat Royal's Proposal "as an aggregate" throughout the negotiating period and at trial (62 Bankr. at 410), Local 6 could not suddenly change tactics on appeal and "prevent rejection by *belatedly* attacking a specific element" of Royal's Proposal. 848 F.2d at 349 (emphasis added). The Court of Appeals also held that the record supported the lower court decisions holding that Royal needed all the modifications in its Proposal to attempt a "truly successful reorganization." *Id.* at 350.

II.

Reasons for Denying the Writ

A. The Court Of Appeals Correctly Held That Petitioner Could Not "Belatedly" Attack One Element Of Royal's Proposal On Appeal After Failing To Offer Evidence At Trial Regarding Specific Elements Of Royal's Proposal

Petitioner asks this Court to decide what it asserts is an important issue under the Bankruptcy Code — whether the elimination of seniority was a "necessary" modification of the

Contract — even though it failed to present any evidence on this distinct issue in the Bankruptcy Court and despite a clear finding by the Bankruptcy Court that

> Royal established [that] its need for relief on the order of magnitude requested was necessary to Royal's economic survival.

62 Bankr. at 418. The Second Circuit affirmed, finding that

> the bankruptcy court's conclusion that Royal had, in fact, shown the necessity for eliminating priority amply is supported by the record and therefore is not clearly erroneous.

848 F.2d at 348.

Both before and after bankruptcy, Royal sought to modify the Local 6 Contract in several respects. Among other things, Royal proposed eliminating certain work rules, including priority. Local 6 consistently refused to negotiate *any* changes to the Contract, including alternate modifications to those proposed by Royal.

At the trial before the Bankruptcy Court, Royal established that each of its proposed modifications would result in substantial savings and that the work rules to be eliminated — priority, training and job classification — cost Royal hundreds of thousands of dollars and extremely limited Royal's flexibility to efficiently organize its plant time and resources.[8] Combined, these work rules would cost Royal over $1.9 million between 1986 and 1989.[9]

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[8] Thus, contrary to Local 6's claim, Royal's ability to increase the flexibility of its unionized labor force would allow Royal to *greatly enhance* its "prospects of successfully reorganizing" (*see* Petition at 26) by allowing it "to mold and adapt in a changing business environment." 62 Bankr. at 417.

[9] Thus, there is *no* factual basis for the dissent's statement that the Second Circuit majority opinion "allows individual anti-union modifications that save management little to lurk in court-approved proposals." 848 F.2d at 355 (Feinberg, J., dissenting). At trial Royal made an extensive showing detailing the disastrous costs of priority and the cost savings of each element of its Proposal.

During the pretrial bargaining period, Local 6 refused to respond to Royal's Proposal on an item by item basis (62 Bankr. at 409), and at trial offered *no* evidence as to what it believed the various work rules cost Royal.[10] Thus, Local 6 has never presented evidence to support its claim that the "elimination [of priority] adds little to an employer's prospects of successfully reorganizing." Petition at 26.

Indeed, to the contrary, Royal established that union labor costs, including priority, were its "single largest expense." 62 Bankr. at 412, 414.[11] Royal then established its need for the proposed modifications to the Local 6 Contract by showing that without modifying the Contract its projected losses would be over five-million dollars between 1986 and 1989. *See* 62 Bankr. at 414. The projected cost savings from Royal's Proposal, including priority, totaled only about four-million dollars. *Id.* As the Bankruptcy Court concluded, "[c]omparison of the proposed savings with projected losses reflects that the savings are less than the losses." *Id.*

Thus, the factual record clearly established Royal's huge current and projected losses, and that the cost savings that would result from Royal's Proposal to modify the Local 6 Contract were a necessary element in Royal's plan for reorganization. Faced with Local 6's refusal to negotiate or propose meaningful alternatives to Royal's Proposal, its failures of proof at trial and the choice between Royal's economic failure and possible reorganization, the lower courts opted for the latter. *See* 62 Bankr. at 418.

On appeal, the Second Circuit held that Royal had made the required showings under § 1113 and refused to allow Local 6 to "belatedly" focus on only one aspect of Royal's Proposal. Given

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[10] Having offered no evidence, Local 6 labels Royal's evidence "conclusory." Petition at 10 n.6.

[11] Union labor cost was also the only expense that had not been cut before Royal's bankruptcy. 62 Bankr. at 412. *See id.* (listing Royal's cost saving measures).

Local 6's failure of proof at trial and its refusal "to negotiate in order to obtain a different combination of modifications," the court held that Local 6 could only argue the very position it had chosen to take throughout: that the "total quantum of savings" in Royal's Proposal was unnecessary to Royal's reorganization. 848 F.2d at 349. Once again, given the trial record and Local 6's failures of proof, the Court of Appeals held that Royal had shown that it needed to eliminate work rules like priority to lower costs and increase productivity so as to meaningfully pursue a "truly successful reorganization." *Id.* at 350.[12]

To the extent petitioner now challenges the factual record in this case for the fourth time, its petition should be denied. Both the District Court and the Court of Appeals reviewed the voluminous factual record compiled by the Bankruptcy Court and disturbed none of the bankruptcy court's findings. *See* 848 F.2d at 350-51; 78 Bankr. at 673-74. *See also Anderson* v. *City of Bessemer*, 470 U.S. 564, 573-75 (1985) (trial court fact-findings not disturbed on appeal where supported by substantial evidence in record). Local 6's petition, however, continues to attempt a re-analysis of the facts. As the Court has stated on many occasions:

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

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[12] Thus, the Court of Appeals did not relieve Royal of its burden of proof by requiring Local 6 to prove that Royal's Proposal was "unnecessary." Petition at 30, 39. To the contrary, the court simply responded to Local 6's failure to rebut Royal's evidence, finding that there was substantial evidence in the record supporting the lower court rulings. Similarly, the Court of Appeals decision does not allow Royal to "totally and permanently eliminate priority." Petition at 10; *see, e.g., id.* at 22, 46. Under § 1113, Royal was only permitted to eliminate priority for the purposes of its Chapter 11 reorganization. Local 6 remains the authorized collective-bargaining representative and could still undertake negotiations with Royal concerning priority and other work rules. *See* 848 F.2d at 351.

Graver Tank & Mfg. Co. v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).[13] As shown above, the only failures of proof in this case were by petitioner Local 6, and the record below should be reviewed no further.

The Court of Appeals holding also does not conflict with the Third Circuit's holding in *Wheeling-Pittsburgh Steel Corp.* v. *United Steelworkers*, 791 F.2d 1074 (3d Cir. 1986). Each holding properly focuses on whether the labor union has laid a foundation for challenging the necessity of a bankrupt company's § 1113 proposal through either negotiation or evidence at the rejection trial. While the District Court and the Court of Appeals, in affirming the Bankruptcy Court, rejected some of the language of *Wheeling*, based on their facts these two cases would have reached the same results in either circuit.

In *Wheeling*, the bankrupt debtor proposed "an unusually long five-year term [contract] at markedly reduced labor costs based on a pessimistic five-year projection." 791 F.2d at 1090. Unlike Local 6, the union in *Wheeling* actively participated in the negotiation process, demanding a "snap back" provision that would recapture certain union concessions if the debtor did better than expected. After the parties bargained to an impasse the bankruptcy court held a trial on Wheeling's rejection proposal.

At trial, again in marked contrast to Local 6, the union showed that both before and after Wheeling's bankruptcy it had responded to the company's needs to reduce costs by making

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[13] Even the dissenting judge below concluded that "[t]he evidence was sufficient to support a finding that a limited intrusion into priority was necessary . . . ." 848 F.2d at 356 (Feinberg, J., dissenting). He also noted that in his view the record was not clear as to the extent of the planned incursion into priority. He concluded therefore:

> Because this factual issue is at the heart of the appeal and because it is a basic principle of federal jurisprudence that courts pass on legal questions only in concrete factual situations, I would not use this case to announce a new interpretation of the necessary proposal requirement.

Id. at 358.

numerous concessions on wages and benefits. *Wheeling*, 791 F.2d at 1077. Significantly, the union also produced evidence at trial contrasting with the bankrupt company's projections of the economic future of the steel industry in general and of Wheeling in particular. *In re Wheeling-Pittsburgh Steel Corp.*, 50 Bankr. 969, 978 (Bankr. W.D. Pa. 1985). The union was thus able to show that the addition of its proposed snap back provision would still allow the bankrupt company to survive and reorganize. The debtor in turn "offered no credible explanation why its proposal did not contain a 'snap back' provision." *Wheeling*, 791 F.2d at 1090.

Vacating and remanding the case to the bankruptcy court for further fact finding, the Third Circuit focused on the evidentiary foundation laid by the union, holding that the lower court erred by failing to consider whether the debtor's proposal could work, *i.e.*, permit reorganization, with the addition of the snap back provision proposed by the union. Until the entire proposal was considered in light of this added provision it could not be said that the debtor's original proposal contained those modifications necessary to the debtor's reorganization as required by § 1113. *Id.*[14]

Thus, *Wheeling* does not hold that a union may attack on appeal an element of the debtor's proposal that it has not focused on or responded to, either during negotiations or at trial. To the contrary, consistent with the Second Circuit decision, *Wheeling* holds that a union like Local 6 may challenge the exclusion of a given provision from the debtor's proposal upon a showing

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[14] To the extent *Wheeling* suggested to the lower court that on remand the necessity of the debtor's proposal be judged by whether the proposed modifications were "directly related to the Company's financial condition and its reorganization" (791 F.2d at 1088) or were needed to "prevent[] the debtor's liquidation" (*id.* at 1089), the decision below is not to the contrary given the record in this case. Royal showed that the modifications in its Proposal did not even generate enough savings to cover its projected losses, and that reducing union labor costs was crucial to its economic survival. *See* 62 Bankr. at 412, 414, 418. Thus, the record here establishes that Royal's Proposal *was* directly related to its financial condition and its reorganization, and that the proposed modifications were needed to prevent Royal's liquidation.

that the union has laid a foundation for this challenge. The union lays this foundation by negotiating for alternate provisions and by presenting proof at trial that its alternatives will still allow the debtor's reorganization.[15]

The decision below also does not conflict with *Wheeling* because it involves a situation not considered in *Wheeling*: one in which the union refuses to negotiate or otherwise provide evidence or input on the debtor's proposal. The Second Circuit, recognizing this, explicitly limited its holding to situations in which the union has refused to participate in the § 1113 process:

> Put simply, *where a union refuses to negotiate in order to obtain a different combination of modifications*, it may not challenge the particular combination, or any vital element, contained in the debtor's proposal. So long as the total quantum of savings is necessary under the *Carey Transportation* standard, the union may not prevent rejection by belatedly attacking a specific element.

848 F.2d at 349 (emphasis added).

Thus, there is no true conflict between the Second and Third Circuits on the issue of when modification to a union contract is "necessary" under §1113. As Justice Harlan stated, "differences between the Courts of Appeals in two or more Circuits will not be accepted as a conflict if they can fairly be accounted for on the basis of variations in the factual situations among the

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[15] When, however, a union like Local 6 refuses to negotiate or present credible evidence concerning the debtor's financial condition and § 1113 proposal, the Second Circuit indicated that this position presents "risks":

> The balance of the equities nearly always will tip in favor of the party that seeks to reach a compromise and to that end negotiates in good faith. 11 U.S.C. § 1113(c)(3).

848 F.2d at 349. Thus, the risk to the union of total non-participation in the § 1113 process is that the debtor will propose and prove its own plan for reorganization which the courts will permit it to pursue.

cases involved." Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 AUSTL. L.J. 108, 111-12 (1959). As no other Circuit Courts have considered this issue under § 1113, this is an appropriate case to allow for further development in the lower federal courts. *See McCray* v. *New York*, 461 U.S. 961 (1983) (Stevens, J.).

The Court of Appeals decision does not permit bankrupt employers "to propose offensive, unnecessary modifications." Petition at 44. Royal proved at trial that its Proposal offered savings that were less than the bankrupt company's projected losses. 62 Bankr. at 414. Given that the goal of Chapter 11 is the debtor's economic survival and reorganization, Royal's Proposal could not have been more narrowly tailored.[16] More importantly, if Local 6 felt Royal's Proposal sought too much it should have come forward with reasonable counterproposals or evidence at trial that Royal could have pursued reorganization without eliminating priority. Local 6 failed to do this and the lower courts applied § 1113 to the record as developed by the parties.[17]

B. There Is No Confusion Among The Lower Courts In Applying Section 1113

Contrary to petitioner's assertion, certiorari is not required in this case to clarify § 1113 for the benefit of the lower federal courts. Petition at 27-28. Decisions by the lower courts demonstrate that these courts understand and can apply § 1113.

The lower federal courts generally apply the same criteria in evaluating § 1113 post-petition proposals. Invariably, the courts

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[16] Indeed, Royal consciously structured its Proposal to avoid requiring any Local 6 employee to take a cut in wages.

[17] Similarly, in *Truck Drivers Local 807 v. Carey Transp., Inc.*, 816 F.2d 82 (2d Cir. 1987), the union "neither participated meaningfully in post-petition negotiations nor offered any reason for rejecting the [debtor's] proposal other than its view that the proposed modifications were excessive." *Id.* at 92. As here, the union's counterproposal in *Carey* didn't cover Carey's losses and offered savings far below those required for reorganization. *Id.* at 86. Thus, as with Local 6, the union in *Carey* laid no foundation, through negotiation or trial evidence, for its attack on the debtor's proposal.

utilize some variation of a nine-point test, originally suggested in *In re American Provision Co.*, 44 Bankr. 907, 909 (Bankr. D. Minn. 1984), which tracks the substantive elements of § 1113.[18]

In a number of these decisions the debtor's bid to reject a union contract has been denied because the courts found that the debtor failed to make an adequate showing of compliance with § 1113 requirements. *See, e.g., In re K & B Mounting, Inc.*, 50 Bankr. 460 (Bankr. N.D. Ind. 1985) (rejection denied where debtor did not provide sufficient information to union and proposal did not require sacrifices from parties other than unionized employees); *In re American Provision Co.*, 44 Bankr. 907 (Bankr. D. Minn. 1984) (rejection denied where debtor made only perfunctory attempts to meet with union and savings under proposal only amounted to about two percent of debtor's monthly operating expenses); *In re Cook United, Inc.*, 50 Bankr. 561 (Bankr. N.D. Ohio 1985) (rejection denied where company showing positive cash-flow, where there were questions as to the accuracy of debtor's accounting, and where impact of proposal on unionized employees was disproportionate to impact on other parties); *In re William P. Brogna & Co.*, 64 Bankr. 390 (Bankr. E.D. Pa. 1986) (rejection denied where proposal contained numerous provisions that would not save the company money and sought to cut union wages while paying creditors back in full).

As the Court of Appeals specifically recognized, § 1113 is a pro-labor law, 848 F.2d at 351-52, and the decisions cited above show that the lower federal courts are not applying § 1113 in an anti-union fashion. Rather, these decisions show that bankrupt debtors must make their proofs as required by § 1113 and show, as Royal did here, that their financial problems are

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[18] *See, e.g., In re Sierra Steel*, 88 Bankr. 337 (Bankr. D. Col. 1988); *In re Sol-Sieff Produce Co.*, 82 Bankr. 787 (Bankr. W.D. Pa. 1988); *In re Texas Sheet Metals, Inc.*, 90 Bankr. 260 (Bankr. S.D. Tex. 1988); *In re Walway Co.*, 69 Bankr. 967 (Bankr. E.D. Mich. 1987); *In re Amherst Sparkle Mkt., Inc.*, 75 Bankr. 847 (Bankr. N.D. Ohio 1987); *In re William P. Brogna & Co.*, 64 Bankr. 390 (Bankr. E.D. Pa. 1986); *In re K & B Mounting, Inc.*, 50 Bankr. 460 (Bankr. N.D. Ind. 1985); *In re Kentucky Truck Sales, Inc.*, 52 Bankr. 797 (Bankr. W.D. Ky. 1985); *In re Cook United, Inc.*, 50 Bankr. 561 (Bankr. N.D. Ohio 1985); *In re Salt Creek Freightways*, 47 Bankr. 835 (Bankr. D. Wyo. 1985).

real and serious, that savings necessary to reorganization can be realized by modifying a labor contract, and that the bankrupt company has treated all parties fairly and has not forced a union to bear a disproportionate share of the reorganization burden. These decisions show that the lower federal courts do not yet require the intervention and guidance of the Court in applying § 1113.

C. The Court Of Appeals Decision Is Consistent With The Language And Legislative History Of Section 1113

In enacting § 1113, Congress recognized that bankrupt debtors must sometimes be permitted to reject collective-bargaining agreements as part of their reorganizations. *See* 130 CONG. REC. S8892 (daily ed. June 29, 1984) (Senator Hatch stating that "[o]ften drastic measures are necessary to save the hemorrhaging company, including rejection of the business labor contract"); 130 CONG. REC. S8900 (daily ed. June 29, 1984) (Senator Moynihan stating that "in certain circumstances, we must recognize that costs, including labor costs, must be lowered for financially troubled firms to survive").

Congress, however, placed a heavy burden on the debtor seeking to reject a collective-bargaining agreement to justify the individual components of its proposal. Thus, the debtor must establish that its proposal is necessary to reorganization. As Senator Packwood observed,

> the debtor will not be able to exploit the bankruptcy procedure to rid itself of unwanted features of the labor agreement *that have no relation to its financial condition and its reorganization* . . . .

130 CONG. REC. S8898 (daily ed. June 29, 1984)(emphasis added). Here, consistent with Congress' intent, Royal showed how priority and its other proposed modifications related to "its financial condition and its reorganization," and showed that in this case labor costs had to be lowered for this "financially troubled firm[] to survive." 130 CONG. REC. S8900 (daily ed. June 29, 1984) (statement by Senator Moynihan). *See supra* at 5-6, 7-8; 848 F.2d

at 350 (discussing the relationship between priority and Royal's financial condition).

Notwithstanding the burdens of proof on the debtor, § 1113 also requires the union "to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement." 11 U.S.C § 1113(b)(2) (Supp. II 1984). Congress made negotiation a part of § 1113 in response to the Court's decision in *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513 (1983), holding that a debtor was not required to engage in collective bargaining before modifying or rejecting provisions of a union contract. *Id.* at 534.

Fearing that under *Bildisco* companies might misapply the bankruptcy law to avoid collective bargaining, every proposed version of § 1113 sought to ensure the union's right to negotiate and participate in the bankrupt company's decision-making process. *See* H.R. 5174, 98th Cong., 2d Sess., 130 CONG. REC. 1842 (daily ed. March 21, 1984) (Rodino proposal); 130 CONG. REC. S6081-82 (daily ed. May 21, 1984) (Thurmond amendment); 130 CONG. REC. S6181-82 (daily ed. May 22, 1984) (Packwood amendment). *See also* 130 CONG. REC. S8891-92, 8897-98 (daily ed. June 29, 1984) (statements by Senators Hatch and Packwood stressing the importance of good faith negotiations between the parties). As passed, § 1113 guaranteed unions a voice in the bankruptcy process that many believed was lost in *Bildisco* by mandating good faith negotiations and information sharing, and by giving the union the ability to offer evidence to the bankruptcy court to show that the bankrupt company's proposal does not meet the requirements of § 1113.[19]

Here, Local 6 refused to participate in the bargaining process contemplated by Congress. Instead, Local 6 staked its case on showing that Royal didn't need any Contract modifications

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[19] When the union does negotiate and present a viable counterproposal the balance of equities under § 1113 will often favor adoption of the union's proposal. As noted by the Bankruptcy Court: "If the Union's proposal and the Debtor's proposal were in fact equally acceptable, the balance of the equities, *see* Code § 1113(c)(3), would not be likely to tip in the Debtor's favor." 62 Bankr. at 407 n.5.

and that Royal had not treated all parties fairly and equitably.[20] Local 6 thus courted the result which occurred here, and the Court of Appeals decision is consistent with § 1113 and its legislative history.

[20] Notwithstanding the importance of a given issue to a labor union (Petition at 44-45), § 1113 contains no provision focusing the reviewing court on particular types of modifications in a debtor's proposal, speaking only in terms of the debtor's "proposal" as a whole. *See* 11 U.S.C. § 1113(c)(1). *See also NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 488 (1960) (under § 8 of the National Labor Relations Act government may not substitute its judgment for collective bargaining of parties).

III.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

MICHAEL D. HESS
Counsel of Record

HALIBURTON FALES, 2D
OWEN C. PELL
WHITE & CASE
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8200

JOHN S. MARTIN, JR.
SCHULTE ROTH & ZABEL
900 Third Avenue
New York, New York 10022
(212) 758-0404

Attorneys for Respondent

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ADDENDUM

§ 1113. Rejection of collective bargaining agreements

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall—

> (A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and
>
> (B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

> (1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize

the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.